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8481  
No. 11660

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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JACOB S. GIMPELSON,

Appellant,

vs.

MAX KAUFMAN, Doing Business as the CHICAGO  
HOTEL AND RESTAURANT SUPPLY, and  
CHICAGO HOTEL, RESTAURANT AND  
MEAT SUPPLY, INC., a corporation,

Appellees.

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## TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

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FILED

SEP 11 1947

PAUL P. O'BRIEN,

CLERK



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Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

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United States Attorney

RONALD WALKER

JAMES C. R. McCALL, JR.

Assistants U. S. Attorney

600 U. S. Post Office and Court House Building  
Los Angeles 12, Calif.

For Appellees:

HERZBRUN & CHANTRY

118 South Beverly Drive

Beverly Hills, Calif. [1\*]

In the District Court of the United States in and for the  
Southern District of California  
Central Division

No. 5837-BH Civil

JACOB S. GIMPELSON,

Petitioner,

vs.

MAX KAUFMAN, Doing Business as the CHICAGO  
HOTEL AND RESTAURANT SUPPLY; and  
CHICAGO HOTEL, RESTAURANT AND  
MEAT SUPPLY, INC., a corporation,

Respondents.

AMENDED PETITION FOR ENFORCEMENT OF  
VETERAN'S REEMPLOYMENT RIGHTS

Comes now the petitioner, Jacob S. Gimpelson, and by  
leave of the Court heretofore granted, files this Amended  
Petition and says:

I.

This petition is filed under the provisions of Section  
8(e) of the Selective Training and Service Act of 1940,  
as amended (50 U. S. C. A. App., Sec. 308(e)), and  
Section 7 of the Service Extension Act of 1941, as  
amended (50 U. S. C. A. App., Sec. 357); and juris-  
diction of the Court is based thereon.

II.

The respondents are engaged in the wholesale and re-  
tail meat business, and maintain and operate a plant, store  
and office for the conduct of said business at 925-927  
West Temple Street in [2] Los Angeles, California. Un-

til about March 31, 1946, respondent Kaufman owned and operated said business individually; but at or about the time he transferred and turned the operation of the same over to the respondent corporation, which he caused to be chartered for that purpose; and since that time the said Kaufman has operated said meat business by and through the respondent corporation, of which he is the dominant officer, director and stockholder, as petitioner is informed, believes and states.

### III.

From January, 1941, until October 23, 1942, petitioner held a position, other than temporary, in respondent Kaufman's employ as general manager of his said meat business at the above location; and on or about that day, petitioner left that position in order to perform training and service in the United States Army, into which he was that day inducted under the Selective Training and Service Act of 1940. Petitioner satisfactorily completed his period of training and service therein on November 6, 1945, and received a certificate thereof pursuant to law. In December, 1945, and on several occasions thereafter within 90 days from November 6, 1945, petitioner applied to respondent Kaufman for reemployment in his former position as general manager of said meat business, and was refused.

### IV.

At all times since November 6, 1945, the petitioner has been, and is now, still qualified to perform the duties of his former position as general manager and the circumstances of neither of the respondents has so changed at any time since October 23, 1943, as to make it either

impossible or unreasonable for them, or either of them, to reemploy and restore petitioner to his former position.

## V.

From the date of petitioner's first application for re-employment aforesaid, to this date, the respondent Kaufman has [3] continuously failed, refused and declined to re-employ petitioner in his said former position, or in any other position of like seniority, status and pay; and since March 31, 1946, the respondent corporation has likewise continuously failed, refused and declined to so employ and restore him.

## VI.

Petitioner's duties and authority in his former position as general manager of said business were to buy, sell and supervise the sale of all meats dealt in at such place of business, and to have charge and direction of all activities and affairs of said business. Petitioner's compensation therefor was a salary of \$35.00 per week, plus an automobile expense allowance of \$15.00 per week, plus a percentage of the profits as follows: 50% of the net profits of the wholesale meat business and 25% of the net profits of the retail meat business, both computed and paid monthly.

## VII.

Petitioner is informed, believes and states that the respondent corporation, and all of its stockholders, directors and officers, have at all times had full knowledge of petitioner's former position in respondent Kaufman's employ, and of petitioner's right to reemployment in that position, and of all of petitioner's applications for reemployment therein, and of the refusal of all such applica-

tions; and that all of them acquired any such interest as they may have in the respondent corporation with that knowledge in mind.

### VIII.

Although respondent Kaufman rejected all of petitioner's applications for reemployment as general manager of said business, he did offer petitioner temporary employment on January 3, 1946, in the inferior position of utility man in said meat business, but without any supervisory authority, and at a salary of only \$40.00 per week. The said Kaufman promised petitioner at that time that [4] such inferior position would end upon the organization of the then proposed respondent corporation, and that when it should be organized, petitioner would then be adequately and agreeably "taken care of." Petitioner accepted such temporary, inferior position, relying on said promise by Kaufman. Petitioner continued thereafter to be employed in such inferior position by the respondent Kaufman, and after March 31, 1946, by the respondent corporation, until May 1, 1946. On the latter date the petitioner was discharged without cause from that position by the two respondents.

### IX.

Had petitioner been reemployed in his former position as general manager, at his former rate of pay, he would have earned therein an average of over \$1,200 per month throughout the period from January 3, 1946, to April 1, 1946, and over \$800.00 per month from April 1, 1946, to date; and he has suffered a loss of wages and benefits in that amount by reason of the respondents' action above set forth.

Wherefore, Petitioner Respectfully Prays:

(a) That the Court adjudge and decree that petitioner was entitled to be reemployed and restored to his former position as general manager of the respondents' meat business aforesaid, on January 3, 1946; and is now entitled to be so restored.

(b) That the respondents be required to so reemploy and restore the petitioner to that position, and to compensate him for his loss of wages and benefits suffered by reason of their unlawful actions aforesaid.

(c) That petitioner recover the fees and costs of the United States herein, for its benefit. [5]

(d) That petitioner have all such other and further relief as may be just and proper in the premises, and that he have general relief.

JAMES M. CARTER  
United States Attorney

RONALD WALKER  
Assistant U. S. Attorney  
Chief of Civil Division

JAMES C. R. McCALL, JR.  
Assistant U. S. Attorney  
Attorneys for Petitioner

[Verified]

[Endorsed]: Filed Dec. 4, 1946. [6]



[Title of District Court and Cause]

## ANSWER

Comes Now the Respondent Chicago Hotel, Restaurant and Meat Supply, Inc., a corporation, appearing for itself alone and not for any other respondent admits, denies and alleges:

### FIRST DEFENSE

The amended petition fails to state a claim against this respondent upon which relief can be granted.

### SECOND DEFENSE

#### I.

Answering Paragraph II of the amended petition, denies each and all of the allegations thereof, but admits that this respondent is engaged in the wholesale and retail meat business and maintains and operates a wholesale plant, store, and office on Fremont Avenue, Los Angeles, California, and operates a retail [7] meat business at 927 West Temple Street, Los Angeles, California; admits that respondent Max Kaufman, was one of the original directors of this respondent which was incorporated on the 21st day of January, 1946; admits that said respondent Max Kaufman is an officer and director and owner of forty per cent (40%) of the capital stock of this respondent; alleges that this respondent began doing business at 915-27 West Temple Street in Los Angeles, California, on or about the 21st day of January, 1946.

## II.

Respondent lacks sufficient information or belief to answer the allegations of Paragraphs III and VI of said amended petition, and basing its denial thereon, denies all of the allegations of said Paragraphs III and VI.

## III.

Respondent denies each and all of the allegations of Paragraphs IV and IX of said amended petition.

## IV.

Answering Paragraph V of the amended petition, respondent lacks sufficient information or belief to answer the allegations thereof insofar as they relate to the respondent Kaufman, and basing its denial thereon, denies the allegations of said paragraph insofar as they relate to the respondent Kaufman; denies each and all of the other allegations of said amended petition.

## V.

Answering the allegations of Paragraph VII of said amended petition, this respondent denies each and all of said allegations insofar as they relate to this respondent, but lacks sufficient information or belief to answer said allegations insofar as they relate to other persons, and basing its denial thereon, denies each and all of said allegations insofar as they relate to persons other than this respondent. [8]

## VI.

Answering the allegations of Paragraph VIII of said amended petition, this respondent lacks sufficient information or belief to answer the allegations of said paragraph insofar as they relate to the respondent Kaufman, and basing its denial thereon, denies each and all of said allegations insofar as they relate to respondent Kaufman; admits that petitioner was employed by respondent on or about the 21st day of January, 1946, until petitioner quit said employment of his own accord on or about the 1st day of May, 1946.

## THIRD DEFENSE

Respondent alleges that it is an independent corporate entity separate, apart, and different from the wholesale and retail meat business formerly operated by the respondent Kaufman, that it has assets far in excess of the assets of the former business of said respondent Kaufman, and that it is in no sense dominated or controlled by respondent Kaufman.

## FOURTH DEFENSE

Respondent alleges that at no time prior to his entrance into the military services was petitioner employed by respondent.

## FIFTH DEFENSE

Respondent alleges that at the time of petitioner's employment by this respondent on or about the 21st day of January, 1946, and thereafter, petitioner was fully in-

formed and knew of the independent existence of this respondent, and that petitioner then and there agreed to work for respondent on the terms then and there agreed upon, and that petitioner then and there and later waived any other rights that he may have then or at any time had.

### SIXTH DEFENSE

Respondent alleges that petitioner is now gainfully employed and has been so gainfully employed in a profitable business ever since petitioner quit respondent's employ on or about the [9] 1st day of May, 1946.

Wherefore, this answering respondent respectfully prays that petitioner take nothing from his petition on file herein, for costs of suit herein incurred, and for such other and further relief as may be just and proper in the premises.

HERZBRUN & CHANTRY

By David Mellinkoff

Attorneys for Respondent

118 South Beverly Drive  
Beverly Hills, California [10]

[Affidavit of Service by Mail]

[Endorsed]: Filed Dec. 19, 1946. [11]

[Title of District Court and Cause]

## ANSWER

Comes Now the Respondent Max Kaufman, sued herein as Max Kaufman, doing business as the Chicago Hotel and Restaurant Supply, appearing for himself alone and not for any other respondent, admits, denies and alleges:

### FIRST DEFENSE

The amended petition fails to state a claim against this respondent upon which relief can be granted.

### SECOND DEFENSE

#### I.

Answering Paragraph II of the amended petition, denies each and all of the allegations thereof but admits that for many years respondent owned and operated a wholesale and retail meat business at 915-27 West Temple Street in Los Angeles, California, [12] and admits that he was one of the original directors of Chicago Hotel, Restaurant and Meat Supply, Inc., a California corporation, which was incorporated on the 21st day of January, 1946; admits that he is an officer and a director and the owner of forty per cent (40%) of the capital stock of said corporation; alleges that said corporation began and he ceased doing business at 915-27 West Temple Street in Los Angeles, California, on or about the 21st day of January, 1946.

#### II.

Answering Paragraph III of the amended petition denies that for the period from January, 1941 until October 23, 1942, or for any other period, petitioner was the general manager of this respondent's meat business; admits that during said period and for some time previous

thereto, petitioner was an employee of respondent's; admits that in November, 1942, petitioner was drafted into the service of the United States Army and left respondent's employ; respondent lacks sufficient information or belief to answer the allegation in connection with the completion of petitioner's military service and basing his denial thereon, denies said allegation of said Paragraph III; denies that in December, 1945, or at any other time within ninety (90) days from November 6, 1945, petitioner applied to respondent for reemployment as general manager, but admits that in or about January, 1946, petitioner was reemployed by respondent and others, and was later employed by Chicago Hotel, Restaurant and Meat Supply, Inc.

### III.

Respondent denies each and all of the allegations of Paragraphs IV, V, VII and IX of said amended petition.

### IV.

Answering the allegations of Paragraph VI of said amended petition, respondent denies each and all of the

Am. Per and ent. 1/10/47 E.L.S., Clerk  
by MEW, Dep. maximum

allegations thereof, but admits that petitioner's compensation during his employment by respondent was \$35.00 per week plus an automobile expense [13] allowance of \$15.00 per week, and admits that in addition thereto, upon petitioner's entrance into military service, respondent gave petitioner the sum of Two Thousand Five Hundred Dollars (\$2,500.00) which sum was based upon and computed from fifty per cent (50%) of the net profits of respondent's wholesale meat business, and twenty-five per cent (25%) of the net profits of respondent's retail meat business for the period from approximately April,

1942, to November, 1942, but denies that said percentage arrangement was other than a gratuity.

## V.

Answering Paragraph VIII of said amended petition, respondent denies each and all of the allegations thereof, but admits that on or about the 3rd of January, 1946, respondent reemployed petitioner for general work in the business then operated by respondent and others at a salary of \$40.00 per week, plus weekly bonuses of \$25.00 given petitioner by respondent personally; admits that petitioner was similarly employed by respondent corporation from and after the 21st day of January, 1946, until petitioner quit said employment of his own accord on or about the 1st of May, 1946.

## THIRD DEFENSE

Respondent alleges that the job performed by petitioner immediately prior to his departure for military service was of a temporary nature and further alleges that said position no longer exists, and that respondent's circumstances have so changed as to render it impossible and unreasonable to restore petitioner to said job or a position of like seniority, status or pay.

## FOURTH DEFENSE

Respondent alleges that the profit sharing arrangement mentioned in said amended petition was a temporary arrangement, and that the circumstances which gave rise thereto have so changed that it would be unreasonable and impossible for respondent to reinstate said arrangement. [14]

## FIFTH DEFENSE

Respondent alleges that prior to petitioner's departure for military service, all outstanding accounts and the

profit-sharing arrangement between petitioner and respondent were fully settled, satisfied, discharged, and terminated.

### SIXTH DEFENSE

Respondent alleges that at the time of petitioner's re-employment by respondent on or about the 3rd of January, 1946, and thereafter, petitioner was fully informed and knew of the changed situation of the business then operated by respondent and others, and then and there agreed to work for respondent and others, and later for respondent corporation, on the terms then and there agreed upon, and that petitioner then and there and later waived any other rights that he may have then or at any other time had.

### SEVENTH DEFENSE

Respondent is informed and believes and basing his allegation thereon alleges that petitioner is now gainfully employed and has been so gainfully employed in a profitable business ever since petitioner quit respondent corporation's employ on or about the 1st day of May, 1946.

Wherefore, this answering respondent respectfully prays that petitioner take nothing from his petition on file herein for costs of suit herein incurred, and for such other and further relief as may be just and proper in the premises.

HERZBRUN & CHANTRY

By David Mellinkoff

Attorneys for Respondent

118 South Beverly Drive

Beverly Hills, California [15]

[Affidavit of Service by Mail]

[Endorsed]: Filed Dec. 19, 1946. [16]



[PETITIONER'S EXHIBIT NO. 1]

PROFIT & LOSS STATEMENT

925 Temple

Wholesale—

Month of September

1942

Sales of merchandise		12982.96
Waste Sales $\frac{2}{3}$		131.42
		<hr/>
		13114.38
Less Sales discount		76.74
		<hr/>
Net Sales		13037.64
<u>Less Cost of Merchandise Sold</u>		
Purchases	13263.84	
Less merch to 927	2267.94	
	<hr/>	
	10995.90	
Less purchase dis.	29.81	10966.09
	<hr/>	<hr/>
Gross Profit		2071.55
<u>Less Cost of Merchandizing</u>		
Salaries	1080.90	
Delivery Expense	7.04	
Gas, Light, Power ( $\frac{3}{4}$ )	91.50	

Shop Supplies ( $\frac{1}{2}$ )	38.23	
General Expense $\frac{1}{3}$	32.66	
Insurance	66.00	
Laundry $\frac{1}{2}$	8.93	
Taxes	33.04	
Rent	100.00	
Telephone	32.42	
Sales, Collection Expense	115.00	
Dues to Association	16.00	
Max Kaufman, salary	170.00	
Banking Expense	1.21	1782.93
	<hr/>	<hr/>
Net Profit		\$ 288.62

Non cash expenses—

Amount to be determined  
by Gimpelson & Kaufman

Depreciation machinery .....

Depreciation trucks .... ..

Bad debts if any..... ..

Inventory adjustment—

we have ending inventory but  
not beginning inventory, however  
ending inventory seems to be  
rather large in comparison with  
ordinary inventory and such amount  
would increase profit.

# PROFIT & LOSS STATEMENT

927

Retail

Month of September

1942

Sales		3538.92
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Waste Sales $\frac{1}{3}$		65.73
---------------------------	--	-------

Total Sales		3604.65
-------------	--	---------

<u>Less Cost of Merchandise Sold</u>		
--------------------------------------	--	--

Purchases	239.99	
-----------	--------	--

From 925 W. Temple	2267.94	2507.93
--------------------	---------	---------

Gross Profit		1096.72
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<u>Less Cost of Doing Business</u>		
------------------------------------	--	--

Salaries	450.00	
----------	--------	--

Gas, Light, Power $\frac{1}{4}$	30.49	
---------------------------------	-------	--

Shop Supplies $\frac{1}{2}$	38.23	
-----------------------------	-------	--

General Expense $\frac{1}{3}$	16.32	
-------------------------------	-------	--

Insurance	10.00	
-----------	-------	--

Laundry $\frac{1}{2}$	8.93	
-----------------------	------	--

Taxes	17.00	
-------	-------	--

Rent	30.00	
------	-------	--

M. Kaufman salary	55.00	655.97
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Gross Profit		\$ 440.75
--------------	--	-----------

Non cash items to me determined—

Depreciation equipment .....	[18]
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## PROFIT &amp; LOSS STATEMENT

925

Wholesale

March 1, 1942 – Sept. 30, 1942

Sales	83682.35
Tallow Sales	1059.44
	<hr/>
	84741.79
Less Sales Discount	793.92
	<hr/>
Net Sales	83947.87
<u>Less Cost of Merchandise Sold</u>	
Purchases	66209.80
	<hr/>
Gross Profit	17738.07
<u>Less Cost of Doing Business</u>	
Salaries	7039.20
Delivery Expense	610.88
Gas, Power, etc.	318.07
Shop Supplies	569.75
Shop Supplies Expense	351.57
Insurance	526.00
Laundry	60.54
Taxes	677.86
Rent	740.00
Telephone	251.06
Selling Expense	742.00
<del>Shop Expense</del>	
Donations	58.00
Advertising	8.00
Dues	90.53
Accounting Fees	140.00
Office Supplies	6.13

M. Kaufman, salary	1395.00	13590.42
Banking Expense	5.83	<del>14590.42</del>
	<hr/>	<hr/>
Net Profit for period		\$ 4147.65

[19]

## PROFIT & LOSS STATEMENT

927

Retail

March 1, 1942 - Sept. 30, 1942

Sales	25,163.32
Tallow Sales	529.72
	<hr/>
	25,693.64

### Less Cost of Merchandise Sold

Purchases	19,243.72
	<hr/>
Gross Profit	6,449.88

### Less Expenses

Salaries	2252.50	
Gas, Power, etc.	106.08	
Shop Supplies	284.87	
General Expense	117.19	
Insurance	56.00	
Laundry	60.54	
Taxes	169.48	
Rent	210.00	3256.66
	<hr/>	<hr/>
Net Profit		\$ 3192.66

No. 5837-BH-Civ. Gimpelson vs. Kaufman et al.  
 Petnr's. Exhibit No. 1. Filed Jan. 10, 1947. Edmund  
 L. Smith, Clerk; by MEW, Deputy Clerk. [20]

## [PETITIONERS EXHIBIT NO. 2]

MUtual 6374-6375

Member  
[Crest]

CHICAGO HOTEL AND RESTAURANT SUPPLY

=====Quality Meats=====

925-927 West Temple Street  
Los Angeles, Calif.

Max Kaufman, Pres.

J. S. Gimpelson

April 15, 1944

To Whom It May Concern:

Mr. J. S. Gimpelson has been associated with The Chicago Hotel Restaurant and Meat Supply Company for a period of seven (7) years. During that time, he has become familiar with the wholesale end of the business as well as the retail, for the reason that we operate four (4) retail meat markets.

Mr. Gimpelson is *thoroughly* capable in handling any jobbing house or retail meat problem which may arise. He also had complete charge of all the buying for three years, and knows *thoroughly* the grading of the various cuts as well as the marketing of meats.

Yours very truly

CHICAGO HOTEL AND RESTAURANT SUPPLY

Max Kaufman

MAX KAUFMAN, Pres.

MK/ep

No. 5837-BH. Gimpelson vs. Kaufman et al. Petnr's.  
Exhibit No. 2. Filed Jan. 10, 1947. Edmund L. Smith,  
Clerk; by MEW, Deputy Clerk. [21]

[Title of District Court and Cause]

## MEMORANDUM OPINION

In the above entitled proceedings the court finds that it would be unreasonable to compel respondent to restore the petitioner to his former position.

It appears clear to me that the respondent, Max Kaufman, the former employer of petitioner, no longer owned and controlled the business where petitioner was formally employed. Max Kaufman in legal effect created a partnership with two of his brothers who owned 60% interest therein. This arrangement culminated in the formation of a corporation, the control of which was no longer in the hands of Max Kaufman.

When petitioner returned from the service he was apprised of this situation and accepted a different position than he formally held in the same business under the new ownership. I find that the [22] petitioner never made application for his former position until after the expiration of the statutory period.

The parties are all related and it is apparent that this proceeding is an outgrowth of a family disagreement, and the present proceeding is the result thereof.

I direct that the petition be dismissed upon the following grounds:

1. That the application for restoration was not made within the statutory period.
2. That the employer's circumstances and his successors in interest have so changed that it would have been unreasonable to restore the petitioner to his former position.

Respondent is directed to submit proposed findings and decree to this court within ten days.

Dated: Los Angeles, California, this 16 day of January, 1947.

BEN HARRISON

Judge

[Endorsed]: Filed Jan. 16, 1947. [23]

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[Title of District Court and Cause]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial on the 10th day of January, 1947, before the Court sitting without a jury, the petitioner appearing by his attorneys James M. Carter, United States Attorney for the Southern District of California, and Ronald Walker and James C. R. McCall, Jr., Assistant U. S. Attorneys for said District, and the respondents by their attorneys Herzbrun & Chantry and David Mellinkoff, Esq.; and the evidence having been received and considered, this Court, having filed its Memorandum Opinion herein dated January 16, 1947, does hereby find and decide as follows:

## FINDINGS OF FACT

### I.

The petitioner brings this suit under the provisions of [24] Section 8(e) of the Selective Training and Service Act of 1940, as amended (50 U. S. C. A. App., Sec. 308(e)), and Section 7 of the Service Extension Act of 1941, as amended (50 U. S. C. A. App., Sec. 357) seeking restoration of former position and compensation for respondents alleged failure to reemploy.



## II.

On and prior to October 23, 1942, the respondent Kaufman owned and operated a wholesale and retail meat business on Temple Street, Los Angeles, and a meat market on Fairfax Avenue, Los Angeles, and employed petitioner, a nephew, in the Temple Street business.

## III.

On October 23, 1942, the petitioner left his position in respondent Kaufman's Temple Street business to perform training and service in the Army, into which he was on that day inducted under the Selective Training and Service Act of 1940. The petitioner entered on active duty November 6, 1942, and satisfactorily completed his period of training and service on November 6, 1945.

## IV.

In 1943, respondent Kaufman sold the Fairfax Market, and thereafter devoted his full time and attention to the Temple Street business.

## V.

In December, 1944, the State of California, in eminent domain proceedings, condemned for road purposes the premises on which the Temple Street business was conducted. In 1944, the Temple Street premises were declared by an official of the City of Los Angeles to be unfit for the conduct of a wholesale meat business.

## VI.

In 1944 and 1945, the respondent Kaufman (a man past sixty years of age) was in ill health, and was advised by a physician [25] to retire from business. By reason of ill health, the difficulties of staying in business during the meat shortage, and the necessity of finding

new premises for the business, the respondent Kaufman intended to retire from business completely, and would have done so but for the intervention of his two brothers, one of whom had previously been a business partner.

#### VII.

In 1945, the three brothers agreed to form a corporation in which the respondent Kaufman would own 40% of the capital stock, and his two brothers 30% each; it was further agreed by the three brothers that before the corporation began functioning, the business would be run as a partnership, with interests in the above proportions. In furtherance of this agreement, one of the brothers sold out his business interests in Chicago, and moved his family to Los Angeles.

#### VIII.

Before incorporating, the two brothers of respondent Kaufman advanced Eleven Thousand Dollars (\$11,000.00) with which to carry on the business and purchase new premises. Respondent corporation was incorporated January 21, 1946, and commenced active business operation on April 2, 1946. Additional monies supplied by the three brothers has increased the capital investment in the corporation to approximately three times the value of the respondent Kaufman's former business. There is no evidence to indicate that respondent corporation was not formed for a bona fide business purpose, or that it is the alter ego of the respondent Kaufman.

#### IX.

In January, 1946, respondent Kaufman neither owned nor controlled the business where petitioner was formerly employed. Petitioner was employed in the business under the new ownership in January, 1946, and on April 2, 1946, by respondent corporation, [26] in a position dif-

ferent from the one held by petitioner on October 23, 1942. This new position was accepted by petitioner without objection after a full explanation of the changed circumstances and character of the business.

X.

Petitioner made no application for re-employment in his former position, or a position of like seniority, status, and pay prior to late March or April, 1946.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this case.
2. Petitioner made no application for re-employment in his former position, or a position of like seniority, status, and pay within the period prescribed by paragraph (b)(3) of Section 308 of the Selective Training and Service Act of 1940, as amended.
3. The employer's circumstances have so changed that it would have been and is unreasonable to restore petitioner to his former position, or to a position of like seniority, status, and pay.
4. Respondent corporation is an independent business entity without obligation to employ petitioner.

Dated: Feby. 17, 1947.

BEN HARRISON

United States District Judge

Received copy of the above this day.

~~Approved as to Form as required by Rule 7(a).~~

Dated: Jan. 29, 1947. James M. Carter, United States Attorney; Ronald Walker, Assistant U. S. Attorney, Chief of Civil Division; James C. R. McCall, Jr., Assistant U. S. Attorney, Attorneys for Petitioner.

[Endorsed: Filed Feb. 17, 1947. [27]

In the District Court of the United States in and for the  
Southern District of California  
Central Division

No. 5837-BH Civil

JACOB S. GIMPELSON,

Petitioner,

vs.

MAX KAUFMAN, Doing Business as the CHICAGO  
HOTEL AND RESTAURANT SUPPLY; and  
CHICAGO HOTEL, RESTAURANT AND  
MEAT SUPPLY, INC., a corporation,

Respondents.

### JUDGMENT

This case came on for trial on the 10th day of January, 1947, before the Honorable Ben Harrison, U. S. District Judge, sitting without a jury, the petitioner appearing by his attorneys James M. Carter, United States Attorney for the Southern District of California, and Ronald Walker and James C. R. McCall, Jr., Assistant U. S. Attorneys for said District, and the respondents by their attorneys Herzbrun & Chantry and David Mellinkoff, Esq., and the Court having heard and considered the evidence and having rendered its Memorandum Opinion herein on January 16, 1947, and having made and entered its findings of fact and conclusions of law;

Now, Therefore, by Reason of the Law and Facts, It Is Hereby Ordered Adjudged, and Decreed by the Court, as follows:

1. That the petition herein be and is hereby dismissed. [28]
2. That the clerk be and is hereby directed to enter judgment herein for respondents.

3. That petitioner take nothing by this suit.
  4. That respondents receive no costs of suit.
- Dated this 17 day of Feby., 1947.

BEN HARRISON

United States District Judge

Received copy of the above this day.

~~Approved as to Form as required by Rule 7(a).~~

Dated: Jan. 29, 1947. James M. Carter, United States Attorney; Ronald Walker, Assistant U. S. Attorney, Chief of Civil Division; James C. R. McCall, Jr., Assistant U. S. Attorney, Attorneys for Petitioner.

Judgment entered Feb. 17, 1947. Docketed Feb. 17, 1947. Book C. O. 41, page 664. Edmund L. Smith, Clerk; by Murray E. Wire, Deputy.

[Endorsed]: Filed Feb. 17, 1947. [29]

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[Title of District Court and Cause]

### NOTICE OF APPEAL

Notice is hereby given that the above named petitioner Jacob S. Gimpelson does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment entered in this case on February 17, 1947, in Civil Order Book No. 41, page 664, denying petitioner relief. This 14th day of May, 1947.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

Chief of Civil Division

By James C. R. McCall, Jr.,

Assistant U. S. Attorney

Attorneys for Petitioner

[Endorsed]: Filed & mld. copy to Herzbrun & Chantry, attys. for respdt. May 14, 1947. [30]

[Title of District Court and Cause]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON THE APPEAL

Comes now the petitioner Jacob S. Gimpelson, and as the Appellant herein, pursuant to the provisions of Rule 75(d) of the Federal Rules of Civil Procedure, states that the points on which he intends to rely on his appeal to the United States Circuit Court of Appeals for the Ninth Circuit, are as follows:

I.

The evidence does not support any of the following findings of the District Court, to wit:

1. That appellant did not make application for re-employment in his former position or in a position of like seniority, status and pay, within the meaning of Section 8(b) of the Selective Training and Service Act of 1940 as amended, within 90 days following his discharge from the United States Army.

2. That the circumstances of appellee Max Kaufman had so [31] changed at the time of appellant's application as to make it impossible or unreasonable for him to reemploy and restore him to his former position, or to a position of like seniority, status and pay, within the meaning of Section 8(b)(B) of said Act.

3. That the appellee corporation, as the successor in business of Max Kaufman, was without obligation to the appellant under said section of said Act.

4. That Max Kaufman's business was run "as a partnership" between December, 1945 and April 1, 1946.

5. That there was an agreement between appellee Max Kaufman and his brothers that his said business "would be run as a partnership" between December, 1945 and April 1, 1946.

6. That the additional monies supplied by Max Kaufman's brothers "has increased the capital investment of the corporation to approximately three times the value of Kaufman's former business."

7. That appellant accepted the inferior position in which he was reemployed "without objection after a full explanation of the changed circumstances."

8. That in January, 1946, appellee Kaufman neither owned nor controlled the business where petitioner was formerly employed; and that the appellant was employed in the business under the new ownership in January, 1946, and on April 2, 1946, by respondent corporation, in a position different from the one held by petitioner on October 23, 1942.

## II.

The clear weight of evidence was, and the District Court should have found that:

1. The appellant on October 23, 1942, left a position, other than a temporary position in the employ of the appellee Max Kaufman, as manager of Kaufman's wholesale and retail meat business; that his rate of pay was \$35 per week salary and \$15 per week expense [32]

allowance, plus 50% of the profits of the wholesale meat business and 25% of the profits of the retail meat business computed monthly; and that appellant left such position in order to perform training and service in the United States Army under the requirements of the Selective Training and Service Act of 1940.

2. That the petitioner was honorably discharged from the United States Army on November 6, 1945 and in December, 1945 applied to appellee Max Kaufman for reemployment, and was then and at all times thereafter, and is now still qualified to perform the duties of his former position.

3. That at the time of such application, appellee Max Kaufman had entered into an arrangement with two of his brothers under which, at a future unspecified date, it was planned to incorporate and expand his meat business; but the charter for said corporation was not issued until January 21, 1946 and it did not take over the business, and Max Kaufman remained in sole ownership and charge thereof, until April 2, 1946, and in the three months January-March, 1946, said business made \$9,295.47 profit, of which appellant's share would have been about \$4,131.00 at his former rate of profit-sharing, if he had been reemployed as manager.

4. That the circumstances of appellee Max Kaufman had not so changed, either beforehand, or between December, 1945 and April 2, 1946 as to make it impossible or unreasonable for him to restore petitioner to his former



position or to a position of like seniority, status and pay; and that he unlawfully refused to do so from January 3, 1946 to April 2, 1946.

5. That the appellant accepted employment by appellee Max Kaufman in the inferior position of handyman, at a straight salary of \$40 per week on January 3, 1946, but relied upon appellee Max Kaufman's representation to him that when the appellee corporation was formed appellant would be "taken care of"; and that appellant did not then, or later, accept such inferior position as [33] a fulfillment of appellee Max Kaufman's obligations under the reemployment provisions. That the appellee corporation continued appellant's employment in such inferior position, at a pay rate of \$55 per week, for 2 weeks after it took over the business on April 2, 1946; and that the appellee corporation took over the business of appellee Max Kaufman intact, knew of appellee Kaufman's reemployment obligation to appellant and was and is itself obligated to him thereby.

5. That after April 2, 1946, while each was able and obligated to do so, both of the appellees failed and refused to restore petitioner to his former position, or a position of like seniority, status and pay in said business, in violation of law, and of appellant Max Kaufman's agreement with appellant.

6. That appellant is entitled to be restored to his former position, or a position of like seniority, status and pay in the employ of appellee corporation and to be com-

pensated for his interim loss of wages and benefits by appellee Max Kaufman in the sum of \$4,131.00 up to April 2, 1946, and thereafter by both appellees until appellant shall be restored.

### III.

The District Court erred in failing to adjudge and decree that appellant was entitled by law on January 3, 1946, to be restored to his former position as manager of the appellees' meat business, at his former rate of pay, and is now so entitled; and in failing to order the appellees to restore him thereto, or to a position of like seniority, status and pay, and to compensate him for the loss of wages specified in Point II(6), *supra*. [34]

### IV.

The District Court judgment dismissing the petition should be reversed and appropriate relief here administered, or ordered on remand.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

Chief of Civil Division

By James C. R. McCall, Jr.,

Assistant U. S. Attorney

Attorneys for Petitioner

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 38 inclusive contain full, true and correct copies of Amended Petition for Enforcement of Veteran's Reemployment Rights; Answer of Chicago Hotel, Restaurant and Meat Supply, Inc.; Answer of Max Kaufman; Petitioner's Exhibits Nos. 1 and 2; Memorandum Opinion; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Statement of Points on Appeal; Designation of Contents of Record on Appeal and Affidavit of Service which, together with one volume of reporter's transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 19 day of June, A. D. 1947.

(Seal)

EDMUND L. SMITH,  
Clerk,

By Theodore Hocke,  
Chief Deputy Clerk.

[Title of District Court and Cause]

Honorable Ben Harrison, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

January 10, 1946, Los Angeles, California

Appearances:

For the Petitioner: James M. Carter, Esquire, United States Attorney; by James C. R. McCall, Esq., Assistant U. S. Attorney.

For the Respondents: Herzbrun & Chantry, 518 Security Building, 510 South Spring Street, Los Angeles, California; by David Mellinkoff, Esq.

Los Angeles, California, January 10, 1947, 10:00 A. M.

(Case called by the clerk.)

Mr. McCall: The Petitioner is ready, your Honor.

Mr. Mellinkoff: The Respondents are ready.

The Court: You may proceed.

Mr. Mellinkoff: May it please the court, I would like leave, with the agreement of the Government, to amend the answer by the insertion of one word on page 2 of the answer of respondent Max Kaufman, in line 32, after the word "petitioners" and before the word "compensation" there should be inserted the word "maximum".

The Court: Any objection?

Mr. McCall: No objection.

The Court: It will be changed by interlineation.

Mr. Mellinkoff: Thank you, your Honor.

Also, your Honor, petitioner's counsel and I have agreed to stipulate to the following facts:

"That the petitioner, Jacob Gimpelson, entered the military service on the 5th of November, 1942, and received a certificate of satisfactory completion of service—"

that is an honorable discharge,

"on the 6th of November, 1945." [4]

Mr. McCall: No. I find the correct date is October 23, 1942.

Mr. Mellinkoff: Isn't that the date of the induction notice?

Mr. McCall: No, that is the date of induction.

Mr. Mellinkoff: The date of entry on active service was November 5th, 1942, and the date of induction, October 23rd, 1942. That is stipulated as far as we are concerned.

Mr. McCall: And the certificate of discharge was November 6th, 1945.

Mr. Mellinkoff: Discharge?

Mr. McCall: Honorary discharge.

Mr. Mellinkoff: Also, that immediately before entering the military service he was employed by the respondent Max Kaufman and also the Chicago Hotel, Restaurant and Meat Supply, Inc.

Mr. McCall: I do not want to stipulate to any of the balance of it.

Mr. Mellinkoff: I thought you wanted to stipulate those dates.

Mr. McCall: We can prove that.

Mr. Mellinkoff: Also, your Honor, I have received petitioner's trial memorandum and there is a rather im-

pressive citation of cases attached to the memorandum which I do not feel are in point. [5]

The Court: Let us not argue that now, counsel. Let us find out what the facts are.

Mr. Mellinkoff: Very well, your Honor.

Mr. McCall: May it please the court, the petitioner desires to amend his trial memorandum.

The Court: Let us not pay any attention to the trial memorandum now.

Mr. McCall: This was a matter of dollars and cents, your Honor.

The Court: That will have to come out in the evidence. The trial memorandum is not evidence.

Mr. McCall: Will you take the stand, please?

### JACOB S. GIMPELSON,

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Jacob S. Gimpelson.

### Direct Examination

By Mr. McCall:

Q. Mr. Gimpelson, you live in Los Angeles?

A. Yes, sir.

Q. How long have you lived here?

A. Approximately ten years.

Q. During that time did you formerly work for Mr. Max [6] Kaufman?            A. Yes, I did.

(Testimony of Jacob S. Gimpelson)

Q. Where was his business located and what did it consist of?

A. His business at the time I worked for him was located at 925-927 West Temple Street. It consisted of a wholesale house which was operated under the name of Chicago Hotel and Restaurant Supply and Retail, which was located at 927 West Temple Street. The wholesale was located at 925 West Temple.

Q. Both branches of the business were known by the name you have given there?

A. No, sir, only the wholesale.

Q. When did you first go to work for him?

A. In 1936.

Q. How long did you continue in the employ of Mr. Max Kaufman?

A. Up until the time I went into the service in October of 1942.

Q. At the time you left for the service state to the court what was the rate of your compensation?

A. At the time I left to go into the service I was receiving \$35.00 per week salary, \$15.00 per week expenses, and 50 per cent of the profits of the wholesale and 25 per cent of the profits of the retail. [7]

Q. What was your position?

A. I was manager of the place.

Q. Of both branches of the business?

A. Yes, sir.

Q. Now, for how long had that arrangement for your compensation been in existence?

A. That arrangement for my compensation had been in existence since April 1942.

(Testimony of Jacob S. Gimpelson)

Q. Did you receive 50 per cent of the profits of the wholesale and 25 per cent of the profits of the retail business?

A. Yes, I did. Let me correct that, please. I believe that it was from March 1942 through September of '42 that profit-sharing arrangement was in existence.

Q. When was it—had it been previously agreed to?

A. Yes, sir; it had.

Q. When had it been agreed to between you and Mr. Max Kaufman?

A. It had been agreed to—let me go back a bit and start with the way that profit-sharing arrangement came into being.

In 1940 I had gone back to visit my folks in New York. That was an authorized leave of absence. I came back from New York in the middle of 1940. Mr. Kaufman suggested to me that I—that while I had been away he had felt that [8] he was a fifth wheel in the business and—

The Court: What do we care about that, counsel? Aren't we interested in the compensation he received at the time that he entered the service?

Mr. McCall: That is right.

Q. Just state when it was—it was agreed that there should be a division of the profits, if you recall.

A. It was agreed in the beginning of 1942.

Q. And took effect in March of that year?

A. March of 1942.

Q. For how long a time prior to the profit-sharing arrangement had you been general manager of the place?

A. Since 19—Since the early part of 1941 I had been general manager.



(Testimony of Jacob S. Gimpelson)

Q. As general manager what were your duties?

A. To generally supervise the operation of the place. I purchased all the shop supplies. Did much of the purchasing of the meat. Sold myself and also supervised the sales effort of the other salesmen whom we had.

Q. Did you have anything to do with the selection of employees?

A. Yes, I did.

Q. Did you select a number of employees that are there now?

A. Yes, sir. [9]

Q. Did you give them directions what to do?

A. Yes, sir.

Q. What about the pricing of meats and the sale of them?

A. I would price the meats and I would tell the salesmen what to sell the meat for.

Q. Now, during the time that you were manager in 1942 was Max Kaufman around the place during the business day?

A. Yes, sir; he was.

Q. How frequently?

A. More or less frequently.

Q. Did he have other business interests?

A. He had an interest in a market on Fairfax, 401—403 North Fairfax.

Q. That was—

A. I believe he owned that market.

Q. Did he spend most of his time out at the Fairfax market or at this place on Temple Street?

A. He spent practically all his time on Temple Street.

The Court: On Temple?

The Witness: On Temple Street, yes, sir.

(Testimony of Jacob S. Gimpelson)

Q. By Mr. McCall: That is up to the time you went into the service?

A. Yes, sir: His major duties were the Fairfax market or major function was to collect or count money in the [10] till at the end of the day, to make the deposit and to ask the manager if there was anything he needed in the way of meats so that when he might go out to purchase meat for the wholesale he would purchase meat for the Fairfax market too.

Q. Now, when did you receive your share of the profits?

A. Just prior to going into the service. We had an accounting one evening and I received \$1,500.00, a check for \$1,500.00. The accountant had determined that the profit—50 per cent of the profits of the wholesale and 25 per cent of the profits of the retail totaled approximately \$2,800.00 and Mr. Kaufman had suggested that he give me \$1,500.00 now and the balance he would pay out to me. He said it would be tough enough for him to get along without me and that—

Mr. Mellinkoff: I object to that as being not responsive and irrelevant. I would like the witness to answer the questions.

The Court: It does not prove or disprove anything. It takes more time to listen to the argument than it does to the evidence.

Mr. McCall: All right.

Q. You received the \$1,500.00 in cash?

A. Yes, sir; I did.

Q. What about the balance? How much was it?

A. And then he paid \$20.00 a week at my request to my mother for approximately a year. [11]

(Testimony of Jacob S. Gimpelson)

Q. Now, at the time that you entered the service was there a man in the employ of Max Kaufman at that place of business by the name of Mr. Morris Kaufman?

A. Yes, sir.

Q. What relation was he to Mr. Max Kaufman?

A. Brother.

Q. Now, for how long had Mr. Morris Kaufman been employed at that place of business?

A. I believe he was employed six months prior to my going into the service.

Q. Was he employed under you?                      A. Yes, sir.

Q. Was he employed by you?

A. Indirectly he was.

Q. And what happened about that?

A. Mr. Max Kaufman had come to me and told me that his brother Morris had gone broke in the retail store that he had—that Morris Kaufman had been operating a retail store on Wilshire and LaBrea, on LaBrea near Wilshire and Morris Kaufman had gone broke in that meat store and was hungry, according to Max Kaufman, and needed a job and Max asked me if I could use him.

The Court: What materiality is that, counsel?

Mr. McCall: That is not, your Honor. What he is now saying is not material. [12]

Q. Go ahead and testify.

The Court: He has testified that he was working there under a certain arrangement at the time he entered the service. Now, let us find out what happened after that.

Mr. McCall: All right, your Honor.

Q. Now, after you came out of the Army did you apply to Mr. Max Kaufman for re-employment?

A. Yes, sir, I did.

(Testimony of Jacob S. Gimpelson)

Q. And when and where was the application made?

A. I got back to Los Angeles on December 8th. On December 9th I called Mr. Max Kaufman and exchanged greetings with him. On December 10th I went down to see him. I talked with Mr. Max Kaufman on December 10th. Mr. Kaufman took me in back of the building, showed me a building, a framework of a building which he was in the process of constructing. He said that he had hoped to have that building finished for me when I got back.

He said that—I believe this is pertinent to the case. He said that he had hoped to make a corporation when I got back and in the corporation would be a brother Joe, who he said had come in from Chicago while I was on the way back from Iwo Jima and he said that his brother Joe had made a lot of money in the gasoline station business in Chicago and was interested in going into the meat business with him in Los Angeles. [13]

He said he hoped to make a corporation between the four of us, his brother Joe, Morris, myself and himself. And he said that he had hoped to use this building as the home of the corporation; that he was then in the process of purchasing a piece of property opposite the bank on Temple and Fremont, and he was also dickering with some house movers to move this framework of a building to that property.

Mr. Kaufman said that he hoped that when I got back to work that I would have patience with his brother, his brother Morris, who was then running the place.

He said that his brother Morris had carried the load while I was in the service. His brother Morris had been working very hard, was nervous and excitable and that

(Testimony of Jacob S. Gimpelson)

if I would have patience with him he would make everything right. That Joe knew how to handle Morris; when Joe come in from Chicago, come into the business, that Joe could handle Morris very well and everybody would be happy.

Q. By Mr. McCall: Now, what about your job now?

A. Then he told me that if I went back there I would find that it was much easier to do business now; that it was not necessary to cater to customers and that if I would just work with Morris for a while until Joe come back and did whatever was necessary for the business that he would smooth out any difficulties when Joe come back.

Then after I went back on that arrangement I worked there— [14]

Q. Now, wait a minute. Did all this conversation occur at one time? A. Yes, sir, it did.

Q. On the 10th of December?

A. The 10th of December.

Q. Now, did you go to work immediately?

A. I went to work—no, sir, I did not go to work immediately. I told Mr. Kaufman that I needed an automobile and a place to live and I would appreciate some time to find both.

He went with me to Cook Brothers to try to get an automobile. He did not offer to help me to find a place to live. I found a place to live. I got sick. I was sick for approximately two weeks. The first time in my life I was sick, and then after I recovered from the flu I went back. This was before the holidays.

I saw Mr. Kaufman. He suggested that I go to work after the New Year's; that things would be all mixed up

(Testimony of Jacob S. Gimpelson)

and Morris was excited as it was and that it would be better if I went to work after the New Year's.

I went to work on January 3rd of 1946.

Q. Now, when you went back to work what was your rate of pay?

A. I didn't ask Mr. Kaufman how much money I was getting but Mr. Kaufman on payday called me into the office [15] and said that he knew I didn't care about the hours or the actual compensation and that if he gave me \$40.00 a week it would keep Morris happy and that he would make it up to me when Joe come back.

Q. All right. Did you go to work and continue to work under that arrangement?

A. Yes, sir; I did.

Q. Did you have any automobile allowance at that time? A. No, sir, none at all.

Q. What were your duties?

A. I was working as a general flunky around the place. Just doing whatever was told me to do—boning meat, scraping the blocks, washing down the walls; hanging meat in the ice-box, cutting meat.

Q. Is that the type of work you did before you went into the service? A. No, sir.

Q. How long did you continue at that type of work?

A. I continued at that type of work until approximately April 10th.

Q. Of 1946? A. 1946, yes.

Q. Now, what happened on or about April 10th that changed your relations?

A. Well, Mr. Kaufman told me that he would make everything right when Joe came back—Joe Kaufman came back [16] from Chicago I would say sometime in Febru-

(Testimony of Jacob S. Gimpelson)

ary, the early part of February. At that time Mr. Kaufman showed no inclination of making anything right. I asked Mr. Kaufman repeatedly if he couldn't use me—couldn't use my abilities to better advantage than doing the type of work I was doing and he kept stalling me and telling me he would make things right when Joe came back. When Joe came back there was no sign of making things right. They still kept me doing that work and Mr. Kaufman said, "There is nothing to talk about now"; that before the corporation was formed he would take care of me and everything would be all right; that there was no point in talking about things now.

Q. When did you learn that a corporation had been formed?      A. I learned that on April 1st.

Q. Of 1946?      A. 1946, yes, sir.

Q. Who told you about it?

A. Mr. Kaufman on April 1st and he said, "Well, boys," and he put his hand here, he says, "today is April Fool's Day but don't let yourselves be fooled. I am the president of the corporation," looking right at me when he said that. That is when I learned that the corporation had been formed.

Q. When did the corporation take over the operation of the business, if you know? [17]

A. On April 1st.

Q. Was your pay for that week split as of April 1st between Max Kaufman and the corporation?

A. Yes, it was.

(Testimony of Jacob S. Gimpelson)

Q. After April 1st or during that week did you go on vacation?

A. No, sir, not immediately. At that time I told Mr. Kaufman I was pretty much upset with that. I began to get the idea that I was just—

The Court: Let us not talk about your ideas. Tell us what happened.

The Witness: Well, on April 1st, approximately, Mr. Kaufman took me down to his attorney and I talked with Mr. Kaufman at his attorney's in Mr. Mellinkoff's office, and they suggested to me that it was—I had told them that I believed that I had certain rights to my old job, to my seniority status and pay that I had enjoyed previous to going into the service. Mr. Mellinkoff and Mr. Kaufman told me that they felt that things could be worked out in the corporation; that I should take a vacation for a couple of weeks; that he would give me \$200.00 for a vacation and that when I came back we would have a meeting in Mr. Mellinkoff's office and Mr. Kaufman instructed Mr. Mellinkoff to talk in my behalf as regards that—my place in the corporation, what I could expect from the corporation and what the corporation could expect from me. [18]

Q. By Mr. McCall: Did you then on a vacation?

A. Yes, sir, I did.

Q. And was \$200.00 advanced to you for that purpose?

A. Yes, sir, it was.

Q. After you returned—when did you return?

A. I returned approximately two weeks later.

Q. Approximately May 1st, around that time?

A. A little bit before that, yes, sir.



(Testimony of Jacob S. Gimpelson)

Q. Did you go back to work?

A. No, sir, I didn't.

Q. What were the circumstances and why not?

A. I went back and saw Mr. Kaufman and Mr. Kaufman asked me if I had found a business yet. I told him I hadn't looked for a business and he suggested that I buy a house. He said, "Any kind of a house." He said that I rent out rooms in that house. "There is lots of money to be made in that." I told him I wasn't interested in that; that I was interested in the meat business and I asked him if he had made an appointment with Mr. Mellinkoff and his brother so that we might all get together and talk over my place in the corporation and what the corporation could expect from me and he told me that he had not; that he had nothing to talk about with me about the corporation.

Q. Now, was anything said about your going back to work? [19]

A. He said that if I wanted to have patience and wait until he got his sausage factory built he would have a job for me in selling sausage.

Q. Was there any offer made or did you ask to go back to work in this Temple Street place?

A. Yes, sir, I did.

Q. And what did he say about that?

A. I told him that I felt I was entitled to have my old job back and he said that, "We are getting along very well without you and there is no reason why you should come back. We don't need a business man to run a meat business now. Anybody that has got meat is a king and I am going to have meat," and he said, "If you want to

(Testimony of Jacob S. Gimpelson)

buy some shares of stock in the corporation I will talk it over with my brothers and see if you fit in."

So I said that I didn't want to buy it. I said that I didn't think I would have to buy shares of stock to get my old job back.

Q. Now, was anybody else connected with that corporation, stockholders, other than the three brothers?

A. Not to my knowledge.

Q. You are a nephew of each one of the brothers?

A. No, sir, I am not. Mr. Kaufman's wife was my father's sister.

Q. So you were not actually related to Morris or Joe [20] Kaufman? A. No, sir.

Q. Did you have any talk with Morris Kaufman about your re-employment there in the store?

A. Not with Morris Kaufman. Morris Kaufman is a difficult man to talk with.

Q. How about Joe?

A. I had a talk with Joe Kaufman.

Q. When did you talk with him?

A. About two weeks after Joe Kaufman had come back. Joe Kaufman had asked me what the difficulty was between Morris and myself that could not be ironed out.

Q. When was this?

A. This was in the middle of February.

Q. 1946? A. Yes, sir.

Q. All right. There at the store?

A. Yes, right in back of the wholesale.

Q. Now, tell what happened, what was said between you and Joe Kaufman.

The Court: Just a moment. How would that be material? His employer was Max Kaufman, wasn't he?

(Testimony of Jacob S. Gimpelson)

Mr. McCall: Yes, your Honor. I want to show the corporation, the entity that took over the business had full knowledge of this matter, had full knowledge of his relation to the business and the circumstances under which he was [21] working there.

The Court: Go ahead.

The Witness: Joe Kaufman had asked me what the difficulty was between Morris and myself that could not be ironed out and I told him that the difficulty could be ironed out if somebody would work on it but nobody was attempting to work on it. "It looks like they are just trying to aggravate the difficulty," and I asked Joe Kaufman if he didn't know that before I went into the service I was getting fifty per cent of the profits of the wholesale and 25 per cent of the profits of the retail and Joe Kaufman told me that Max had told him that I was getting forty per cent of the profits of the wholesale and 25 per cent of the profits of the retail and I told Joe that his brother, Max, had lied to him when he said only forty per cent. I suggested to Joe that we go in to see Max now and find out if I wasn't getting fifty per cent and Joe said, "Well, what difference does it make anyway, stuff like that?"

Q. By Mr. McCall: Was anything said about your former position there as general manager or manager of the place of business?

A. Yes, sir. I had asked him if he didn't know that I was running the business before I went into the service. He said he did know that.

Q. Morris Kaufman, as you say, worked under you before [22] you went into the service?

A. Yes, sir, he did.

(Testimony of Jacob S. Gimpelson)

Q. Do you have any knowledge of the amount of profits of the wholesale and retail business of your own knowledge? A. No definite knowledge, no, sir.

Mr. McCall: I believe that is all.

Cross Examination

By Mr. Mellinkoff:

Q. Jack, when you were first employed by Max Kaufman—can you recall approximately when it was? You said in '36 sometime.

A. I believe it was in 1936, yes, sir.

Q. How old were you then?

A. I believe I was—well, 1396 was 11 years ago. I was about 23 years of age, 22 years of age.

Q. And just prior to that you had been living in the East? A. Yes, sir.

Q. And you came out here to go to work for Mr. Kaufman? A. That is right.

Q. When you first came out here where did you live?

A. I lived with Mr. Max Kaufman.

Q. Had you had any previous experience in the meat business? A. None at all. [23]

Q. At that time? A. None at all, sir.

Q. Now, when you first went to work for Mr. Kaufman what did you do?

The Court: Counsel, what materiality is that?

Mr. Mellinkoff: May it please the court—

The Court: You have raised the question here as to a change in conditions at this place of business. If this petitioner, when he went into the service, had a certain position with the company and unless there is some extraordinary reason why he should not be re-employed, he is

(Testimony of Jacob S. Gimpelson)

entitled to that position following his discharge from the service.

Mr. Mellinkoff: That is right, your Honor.

The Court: And what difference does it make whether the respondent trained him? Is there any question about the arrangement or his employment at the time he went into the service?

Mr. Mellinkoff: There is no question that he was employed. I am trying to give some of the background of this case to show what the relationship was between the parties and to indicate that the petitioner's estimate of his importance in the business there is not what he stated it to be.

The Court: I don't care what his importance was. What difference does it make in the case so long as he was [24] employed in a certain position? If he was employed in a certain position he is entitled to that position upon his discharge from the service unless he comes within the exceptions.

Mr. Mellinkoff: Precisely. I will endeavor to show that his position was not what he said it was and that when he came back he was taken back into the business. He wasn't doing exactly what he had been doing before he went into the service because of changed circumstances.

The Court: But according to the petitioner's testimony he had a profit-sharing arrangement prior to going into the service. You might call the profit-sharing arrangement some sort of bonus.

Mr. Mellinkoff: I would like to show your Honor that was a very temporary thing. I would like to show that for the vast period of his employment up until the time just before he went into the Army, all he had received

(Testimony of Jacob S. Gimpelson)

was a small salary and a commission and that this profit-sharing arrangement that he speaks of is something that he got because of the war and because of the departure of other people from the business; and now instead of it being a case of a veteran trying to be compensated for losses that he has suffered on account of the war, it is our position here that he is attempting to take advantage of a war-time situation which was the only reason why he got this so-called bonus. [25]

The Court: Then why don't you get down to that point? I do not care to hear about whether he lived with his uncle and the relationship between the parties.

Mr. Mellinkoff: Very well, your Honor.

Q. Jack, in 1941 what was your compensation from Mr. Kaufman?

A. I don't know exactly what it was, Mr. Mellinkoff. I would say that it was somewhere around \$25.00 a week and a certain amount for expenses and bonuses—small bonuses.

Q. I would like to show you this record to see if it refreshes your recollection and ask what your compensation was. A. This is the year 1940, sir.

Q. '41 starts here.

A. Yes, sir; that is right. There was some expense.

Q. This is just the Social Security record. It does not show your expenses. Now, what did you say that your salary was?

A. I thought it was around \$25.00 a week plus \$8.00 expenses, plus bonuses, small bonuses.

Q. This shows \$17.00. A. That is right.

Q. And in addition to that you got a bonus?

A. Small bonuses, yes, sir.

(Testimony of Jacob S. Gimpelson)

Q. Amounting to how much? [26]

A. I can't say exactly how much.

The Court: Approximately how much?

The Witness: Oh, it varied, sir. It would be up to about \$25.00 a month.

Q. By Mr. Mellinkoff: Your regular compensation during the bulk of 1941 was \$17.00 in salary plus expenses, is that right?

A. No. Here we start 1941 and I was getting \$25.00 a week plus expenses.

Q. Just a moment. Here is January 1941.

A. Right.

Q. Now, January to November the 8th?

A. Right.

Q. From January of 1941 until November the 8th, 1941, your regular weekly salary was \$17.00 plus an \$8.00 expense account, is that right?

A. Yes, sir.

Q. And from the—that was down and to the 8th of October?

A. Yes.

Q. From the 15th of October to the end of the year your regular salary was what?

A. \$25.00 a week.

Q. And at that time your expense account was what?

A. I don't remember. I think it was around \$8.00.  
[27]

Q. Or was it \$5.00?

A. It may have been. I don't recall.

Q. Then in 1942, from January of 1942 through March of 1942 what was your salary?

A. \$25.00.

Q. And at that time your expense account was what?

A. About \$8.00, I think.

(Testimony of Jacob S. Gimpelson)

Q. Or could it have been \$5.00?

A. It could have been \$5.00 or it could have been \$15.00.

The Court: What was the expense account to cover?

The Witness: Automobile expenses, sir, and different types. For instance, in restaurants where I would go to eat and take orders from chefs sometimes and buy a package of cigarettes or something like that.

Q. By Mr. Mellinkoff: Then in April of 1942 down to October of 1942 your regular salary was what?

A. \$35.00 a week.

Q. And an expense account? A. \$15.00.

Q. Now, up until approximately October of 1942 had you ever been paid anything on account of a percentage arrangement? A. No, sir.

Q. All you had received was your regular salary plus an expense account? [28] A. Plus Bonuses.

Q. How much did the bonuses amount to?

A. I don't know, sir. I do not recall. You have the records there.

Q. Well, I have a record of a \$5.00 bonus here. Is that it?

A. That was one. You have other bonuses. You don't have the expense account either, do you?

Q. No, I don't have the expense account.

A. You don't have the list of the bonuses that we received—the other employees too received bonuses.

Q. I am not asking that. If you remember you can state to the court what if any bonuses you received.

A. I don't recall the amounts of the bonuses. I am sorry.

Q. Can you estimate them? A. I can.



(Testimony of Jacob S. Gimpelson)

The Court: If you have the record why argue about it?

Mr. Mellinkoff: I don't have the record readily available, your Honor. I would just as soon have the man state it if he knows it.

Q. Do you know a man by the name of Joe La-Rue (?)? A. Yes, sir, I do.

Q. Was he working in the business at the same time you were? [29] A. Yes, sir.

Q. About when did he come into the business?

A. I believe he came into the business about 1939.

Q. And when did he leave the business?

A. He left sometime in 1941, I believe.

Q. October or November of 1941—about that time?

A. Well, it is difficult for me to say, sir.

Q. Do you know why he left the business?

A. Yes, sir; he left to go into the service.

Q. What was he doing before he went into the service?

A. He was working as a salesman under me, selling in Hollywood.

Q. Where were you selling?

A. I was selling downtown.

Q. You were selling downtown and he was selling on the west side? A. Yes, sir.

Q. Now, up until the time that he went into the service do you know what his salary was?

A. No, sir. It was approximately the same as mine.

Q. Approximately the same as yours?

A. Yes, sir.

Q. Now, at the time that—just before you went into the Army, when you got this money from Mr. Kaufman,

(Testimony of Jacob S. Gimpelson)

all together you got approximately \$2,500, is that correct? [30]      A. That is right, sir.

Q. Including the \$1,500.00 to you and \$1,000.00 to your mother?      A. That is right.

Q. But that was not the full amount represented by fifty per cent of the profits of the wholesale and 25 per cent of the retail, was it?      A. That is right.

Q. I beg your pardon?

A. That is right, sir. It was not.

Q. And that settlement was based on what period?

A. From March of 1942 through September of 1942.

Q. But it was none the less agreed, was it not, that the money that you received at that time was in full settlement of the account for that period?

A. No, sir; that wasn't the way I understood it at all.

Q. What is that?

A. That is not what I understood at all.

Q. Did you understand there was some more money coming to you?      A. Yes, sir, I did.

The Court: We are not trying an accounting suit here—something that happened before the war in this litigation.

Mr. Mellinkoff: Very well. [31]

The Court: Before his entry into the service.

Q. By Mr. Mellinkoff: Now, do I understand you to say, Mr. Gimpelson, that you bought the meats for the business before the war?

A. Yes, sir, I did. I bought much of the meats—not all but much of the meats that we used I bought.

Q. Who bought the rest of it?

A. Mr. Max Kaufman.

(Testimony of Jacob S. Gimpelson)

Q. Where did you buy your meats?

A. I bought meats in most every packing house in the City, Cudahy, Wilson. I bought meat at Great Western.

Q. Now, just for the sake of getting this clear—I don't want to be carping about what you mean by "buying meats". But when I asked you did you buy the meats I did not mean did you buy a leg of lamb or something like that. Were you buying a substantial portion of the meats sold in the business? A. Yes, I was.

Q. About what proportion would you say?

A. More than half. I can even do better than that, sir. I can tell you just about the items which I was buying and the items which Mr. Kaufman was buying.

Q. All right.

A. Mr. Kaufman was buying the straight beef, the carcass of beef. I was buying practically of the veal, [32] much of the lamb and practically all of the offal and pork products—ham, bacon, pork loins.

Q. That you say you bought from the Wilson Company? A. I bought from all of them.

Q. And Cudahy? A. Yes, sir.

The Court: Counsel, I do not care to hear any more along that line. Here is a man who returned from the service and we are now here to determine what kind of job he is entitled to be restored to, if any. Let us find out what the general picture is.

Mr. Mellinkoff: I would like to impeach this witness, your Honor.

The Court: Well, he said he was general manager of this store.

Mr. Mellinkoff: That is correct, and now he is testifying that—

(Testimony of Jacob S. Gimpelson)

The Court: If he was general manager or whatever his duties may have been as general manager he is entitled to that position if conditions are such that he can be restored to it, is he not, and not whether he is going to be permitted in the future to purchase hams or limited to pork products.

Mr. Mellinkoff: That certainly is not the issue. That is not the issue, but I think it is very material to find out what he calls being "general manager." I mean, after all, [33] "general manager" is a very vague term. He has stated that one of his jobs was the buying of meats which in a meat business, be it wholesale or retail, is most important.

Now, I have affidavits here from the Wilson Company—

The Court: Affidavits are not admissible, counsel. Here is a man who testified he was receiving \$35.00 a week, which includes expenses, and he was receiving fifty per cent of the wholesale profits and 25 per cent of the retail profits—

Mr. Mellinkoff: For a very limited period.

The Court: And you claim that was a temporary arrangement.

Mr. Mellinkoff: Yes, your Honor.

The Court: All right. Now, why not get into that question instead of determining whether he had to, as general manager, sweep the floors or whether he went out and bought ham and bacon.

Q. By Mr. Mellinkoff: Did you have any agreement with Mr. Kaufman, Gimpelson, before the war as to how long this percentage arrangement was to run?

A. No agreement, sir. I assumed it was to go indefinitely.

(Testimony of Jacob S. Gimpelson)

The Court: It isn't a question of what you assumed. Was there an agreement?

The Witness: No, sir. [34]

Q. By Mr. Mellinkoff: Was there anything in writing? A. No, sir.

The Court: Let us find out when this new arrangement was made. You said in March.

The Witness: Yes, sir.

The Court: Before you went into the service?

The Witness: Yes, sir.

The Court: What were you doing prior to that?

The Witness: The same thing I was doing after March.

The Court: Well, what was the occasion of the change in your arrangement at that time?

The Witness: This goes back to what I started to say, in 1940—

The Court: I do not want to go back to 1940. You had, as I understand, an arrangement for a percentage of the profits. What brought that about? What brought the change at that time?

The Witness: I had been working very hard in the place. I had been selling, I had been buying, I had been cutting meat. I had been delivering orders.

The business had not been very solvent. Mr. Kaufman owed the packing houses for several weeks' meat bills. We had not very good equipment. Mr. Kaufman said that if I would bear with him and work at that low salary, work with him until we had money in the bank, until the [35] business was established solidly then he would give me whatever I wanted from the business. He led me to believe that the business would some day be

(Testimony of Jacob S. Gimpelson)

mine. He told me so in these words. He said he had two children. He had a son who was studying to be a doctor and he had a daughter who was married to a big shot in the Philippines and that neither one of them needed the business; that I was the only one in the family who had ever done him any good in the business or who had an interest in the business, and he said if I bore with him, worked with him in the business at that low salary until the business was solid, then he would take care of me when the business was solid. He had told me that I was to receive \$25.00 a week salary and a 7 per cent commission on all the business which I did. He never gave me that 7 per cent commission. In lieu of that he said, after I had earned—worked there a long time, he said that he would give me whatever I wanted when the business was solid.

In the beginning of 1942 the business was solid and I talked with him and we derived at this profit-sharing arrangement at that time.

The Court: Proceed.

Q. By Mr. Mellinkoff: Now, Gimpelson, when you came back from the Army you testified that the first time you spoke to Max Kaufman was on the 10th of December. Is that [36] correct?

A. In person, yes, sir. I had called him the day before on the telephone.

Q. But on the 10th you saw him in person?

A. I believe so, yes, sir.

Q. Where at?

A. In the wholesale at 925 West Temple Street.

Q. Was anyone else present at the time?

A. Yes, sir; practically all the help that was there.

(Testimony of Jacob S. Gimpelson)

Q. Now, at that time, Gimpelson, was anything said about this percentage business? A. No, sir.

Q. Was anything said about how much money you were going to get when you came back to the business?

A. No, sir.

Q. Did Mr. Kaufman tell you anything about the changed circumstances of the business?

A. Yes, sir, he did.

Q. What did he tell you?

A. He told me that I was going to find it was much easier to do business now than it had been during my time.

Q. Aside from that. You already testified to that.

A. (No answer.)

Q. Did he tell you anything about money that had been invested in the business? [37]

A. No, sir, he did not.

Q. Didn't he tell you that Morris and Joe Kaufman, his brothers, had already given him some money?

A. He told me, I believe, that Morris Kaufman had given him a check. He showed me that check which he was carrying around in his pocket.

Q. How much was that check?

A. I don't recall exactly. I believe it was \$5,000.

Q. Did he say what that was for?

A. No, he said that they had given it to him before the corporation was going to be formed.

Q. He told you that a corporation was going to be formed?

A. He said that he figured on making a corporation, yes, sir.

(Testimony of Jacob S. Gimpelson)

Q. Did he tell you anything of the reason for taking in this new capital?

A. Well, other than the fact that Joe had money. I don't think he mentioned or specified any other reason.

Q. Anything said about the fact that the land owned by Mr. Kaufman and the land from which the business was being done was being condemned by the State in eminent domain proceedings?

A. Yes, sir. He told me that the buildings which he had been—which he had rented and which he was still renting had been condemned by the State. His words, “taken [38] away by the State,” and he told me that it was necessary for him to move the framework of the building which he had been working on to a new location which he had had his eye on for the past nine years. He said this new location was to be on the corner Fremont and Centennial opposite the bank.

Q. Did he tell you anything of the capital required to purchase the new premises?

A. Fremont and Temple was the location of the new—where the building was to be moved to.

Q. You don't mean that the building that he was leasing was going to be moved, do you?

A. No. I mean the building that was in the process of construction.

Q. You mean a light frame building in the rear?

A. Yes.

Q. But not the building from which the business was being conducted at that time?

A. That is right. He rented that. He couldn't move it.



(Testimony of Jacob S. Gimpelson)

Q. And he told you that that had been condemned, that building? A. Yes, sir; he told me it had.

Q. And also that the adjacent premises that had been owned by Mr. Kaufman, that was used for the truck, did he tell you that had been condemned also? [39]

A. That was just a driveway. He did not say anything about that being condemned.

Q. He didn't tell you that that had been condemned?

A. Well, possibly he did.

Q. Did he also tell you that the Health authorities had objected to the use of these particular premises on Temple Street for a wholesale meat business?

A. No, sir, he didn't.

Q. Didn't say anything about the unsanitary condition existing there? A. No, sir, he did not.

Q. Did he tell you anything to the effect that the business actually no longer was his because his brothers now had an interest in it? A. No, sir, he did not.

Q. Well, what was said in regard to that \$5,000 check that you speak of?

A. He just showed me a check. He said his brother had made money, Morris had saved money during the war and had given him \$5,000 which he was going to use in the corporation.

Q. Did he say what he was going to use it for?

A. No, he didn't.

Q. Did he say anything about any money that Joe was putting in? [40]

A. Yes, sir. He said Joe had made a lot of money in the gasoline station business and that Joe was going to put in money into the business too.

(Testimony of Jacob S. Gimpelson)

Q. When was the first time that you learned what your salary was going to be after you came back?

A. That payday, the first payday.

Q. That would be when?

A. On a Wednesday.

Q. The first Wednesday after you came back in January, is that right? A. Yes, sir.

Q. And what was that pay check?

A. It was \$40.00 less taxes.

Q. Did you say anything at that time to Mr. Kaufman about the \$40.00?

A. No, I didn't. I had never asked him for money as long as I had been with him.

Q. In addition to the \$40.00, did Mr. Kaufman personally give you anything? A. No, sir.

Q. Up until the time that you left the business and after you came back how much money were you getting?

A. \$40.00 a week. Repeat that question, please, sir.

Q. From the time you came back after the war until the time that the relationship was severed sometime in April, [41] what was your rate of pay?

A. \$40.00 a week up until the last ten days of my employment—the last full week. I received \$55.00 a week and the last three days which completed the week after we had met in your office, I received, I believe it was, \$28.00—the proportionate share of the \$55.00 weekly salary.

Q. Isn't it a fact, Jack, that in addition to this \$40.00 a week Mr. Kaufman was personally giving you out of his own pocket \$25.00 a week?

A. That is not a fact.

Q. Was he giving you anything? A. No, sir.

(Testimony of Jacob S. Gimpelson)

Q. Didn't he tell you that \$40.00 a week was all that his brothers would stand for but that he would give you something besides that?

A. No, sir, that wasn't it at all.

Q. When did you first object to the \$40.00 a week?

A. I first objected to it about the time Joe came here or shortly before Joe came in.

Q. Which you said was the middle of February, is that right?

A. Yes, sir.

Q. Now, up until that time had you said anything to Mr. Kaufman or to Morris Kaufman to the effect that you [42] should have more money?

A. Yes, sir, I did.

Q. When did you say that and to whom?

A. I talked with Max Kaufman many times. I told him it was extremely difficult to work under the conditions which I was working under.

Q. Let us talk about the money now.

A. I told him rent was very high, living conditions was very high. It was difficult for me to get along on that kind of money unless I dug into my savings.

Q. Was anything said about the percentage deal?

A. No, sir, it wasn't, not at that time.

Q. Nothing was said about that until after Joe came back, is that right?

A. That is right.

Q. Was anything said about your position, so-called position as general manager?

A. Yes, sir, it was.

Q. When was something said about that?

A. About a week after I had been there.

(Testimony of Jacob S. Gimpelson)

Q. Well, now, when you first came back was there anything said about your job as general manager?

A. Wasn't said in that many words. It was said indirectly. Max Kaufman asked me to go to work and work with Morris. [43]

Q. Did he tell you what you were going to do?

A. He said that I should just work with Morris. He left it up to me to do the work, to do the work what was necessary for the business.

The Court: Just a moment. You said the last ten days you were there you were receiving compensation at the rate of \$55.00 a week.

The Witness: Yes, sir.

The Court: What was the occasion of the increase from \$40.00 to \$55.00?

The Witness: Mr. Kaufman had said that the corporation had been formed and he said that the corporation's attorney had suggested I be paid more money and so he raised me to \$55.00 a week.

The Court: And you could have continued there at the rate of \$55.00 a week?

The Witness: I do not believe so, no, sir.

The Court: You quit of your own accord?

The Witness: No, sir, I did not.

The Court: Were you discharged?

The Witness: Yes, sir.

Q. By Mr. Mellinkoff: Now, after—oh, pardon me just a moment. Did you ever ask Morris Kaufman for your job as general manager?

A. No, sir, I did not. [44]

(Testimony of Jacob S. Gimpelson)

Q. Now, when Joseph Kaufman came back, you say in the middle of February, did you tell him that you were supposed to be general manager of the place?

A. Yes, I did.

Q. Now, when you came back did you get along with Morris Kaufman?

A. Not too well, no, sir.

Q. Did you ever fight with him?

A. No, sir.

Q. Did you ever threaten to kill him?

A. No, sir.

Q. Now, on the occasion that you spoke of when you came to my office with Mr. Kaufman and you got \$200.00, do you recall anything being said about a sausage business?

A. Yes, sir.

Q. What was said? Will you tell the court what was said?

A. You and Mr. Kaufman both told me that Mr. Kaufman and his brothers were intending to have a big business; that they were figuring on having me in that business; that from a long range viewpoint I should be interested in staying with that business because there was a need for that type of business in Los Angeles. That Mr. Kaufman thought I was a very good man and that he wanted me in that corporation and that he knew there wasn't enough work there for my abilities [45] at the present time.

This is what Mr. Kaufman said. And that when the sausage factory was built that there would be plenty of work for me as a sausage salesman or in charge of the sausage department. And I told you and Mr. Kaufman that I didn't know anything about the sausage business; that I was a manager of a wholesale and retail meat business.

(Testimony of Jacob S. Gimpelson)

Q. Now, what was the understanding when that conversation broke up?

A. The understanding was that I would take a vacation for two weeks and during that time Mr. Kaufman would talk with his brothers and would decide where I fit into the corporation and what the corporation could expect from me, and that when I returned from the vacation that we would have a meeting in your office and you would speak on my behalf to fit me into that corporation.

Q. Now, when you came back from your vacation of the three brothers, Max, Morris and Joseph, whom did you see?

A. Max.

Q. Did you see the other two at all?

A. Yes, sir, I did.

Q. Did you speak to them about your job?

A. No, sir.

Q. But you did speak to Max?

A. Yes, sir. [46]

Q. Now, approximately when did that conversation take place?

A. That took place either the latter part of April or it took place—it took place in the latter part of April.

Q. And where?

A. It took place partly in the new building which Joe was building and then we walked along the block to the old business, to the wholesale, and we talked in back of the wholesale.

Q. And what was said at that time?

A. Well, I asked Mr. Kaufman about my old job; if he had had a meeting with you and when I was to meet with you and with his brothers and he said that he had nothing to talk with me about and his brothers and you in

(Testimony of Jacob S. Gimpelson)

your office, and he said that he had that—that they were getting along very well now without me; that they were making more money than they ever made with me and that unless I chose to buy shares of stock in the corporation that they did not need me.

Q. Is that all that was said? Is that all that he said?

A. No. He said—I told him that I had—that I had been told by attorneys that I had legal rights as well as moral rights to have my old job back; that I hoped he would not force me to exercise my legal rights. I told him [47] that I had been assured by—

Q. Just a moment. Did Mr. Kaufman say anything else on this occasion that you recall?

A. Yes, he did.

Q. What else?

A. I showed him an extract of the Selective Service law and I told him—

Q. I am not interested in what you told him.

The Court: Let him tell what he told him. If you are going to have a part of the conversation let us have it all.

Mr. Mellinkoff: Very well.

The Witness: I showed him an extract from the Selective Service law and in the extract it stated I was entitled to have my seniority status and pay which I formerly enjoyed. And I asked Mr. Kaufman to please take it to his attorney, show it to his attorney and see if we couldn't get together to arrive at an amicable solution of this, and whether he liked it or not the relationship still existed; that it was extremely unpleasant for me to have publicity as regards our relationship and business. I asked him if we couldn't possibly work this thing out

(Testimony of Jacob S. Gimpelson)

satisfactorily and he said, "It looks like you will only be satisfied with legal means." His words were not "legal means." He said, "You will only be satisfied to turn this over to lawyers." He said, "Well, you go ahead." He said, "The State's lawyers are a [48] bunch of politicians. I have got a smart lawyer and he will make this out of a State's lawyer," and he took a handkerchief and squeezed it in his hand.

Q. That is enough.

A. You asked for his conversation and that is it, sir.

Q. Now, did you say anything to him at this time about the OPA? A. No, sir, I did not.

Q. Was the OPA mentioned in the conversation at all? A. No, sir, it was not.

Q. Are you sure? A. Pretty sure, yes, sir.

Q. Now, let me see. Do you recall anything like this being said? Do you recall that you said to Mr. Kaufman on this occasion that you are speaking of, that you knew some people down at the OPA?

A. I did know people there. I don't recall ever saying it to Mr. Kaufman. I may have.

Q. Do you recall something to the effect, saying something to the effect that Morris Kaufman did not know how to make the bills properly?

A. I said Morris Kaufman didn't know how to read and didn't know how to write and insisted on making out bills.

Q. And didn't you say to Mr. Kaufman that unless he took you back that he was going to get in trouble with the [49] OPA?

A. I told him that it was extremely likely he would.

Q. That he would what? A. Get into trouble.



(Testimony of Jacob S. Gimpelson)

Q. With the OPA? A. Yes, sir.

Q. Unless he took you back?

A. No, sir. Unless he had the bills made out properly.

Q. But you cannot recall whether or not you told him you knew people at the OPA?

A. I told you I did know people at the OPA. I cannot recall whether I had told him I knew people there. Possibly I did. If that satisfies you.

Q. And did you say to him furthermore that as far as you were concerned this thing was not going to cost you any money and it would put Mr. Kaufman to considerable expense? Did you tell him that?

A. Yes, sir, I did.

The Court: He told him the truth, didn't he?

Mr. Mellinkoff: I am afraid he did on that occasion, your Honor.

Q. Now, Gimpelson, in your complaint here you say that in December 1945 and on several occasions thereafter, within 90 days from November 6th, 1945, "petitioner applied to respondent Kaufman for re-employment in his former [50] position as general manager."

A. Yes, sir.

Q. Now, you have testified that up until sometime in the middle of February that nothing at all had been said in regard to this profit-sharing deal. Is that correct?

A. I believe so, reasonably correct, yes, sir. Let me qualify that. It was assumed if I did get my old position back—

Q. Who assumed that?

A. I did. And I hoped Mr. Kaufman did.

(Testimony of Jacob S. Gimpelson)

Q. Was anything said about it?

A. No, sir, I don't believe it was.

The Court: As I understand your testimony it was not until about April 1st that you made any protest?

The Witness: No, sir. I made protests from the first week I had been there as to the nature of my duties and to the position which I held and had been reassured each time.

The Court: By whom?

The Witness: By Mr. Max Kaufman, that first I would be given my old job back and everything would be taken care of when Joe came in; that that would take place in about two weeks. Joe didn't come in until about six weeks and I struggled along and then he said the corporation would be formed very shortly and that I would have everything I wanted before the corporation was formed. And I struggled [51] along like that under that promise, assuming that my old job would be given to me in a short time.

Q. By Mr. Mellinkoff: Now, wait a minute. Was anything said that you were going to get your old job back or they were going to try to make a place for you?

A. They said everything would be taken care of. They were the words he used. Those were the words used.

Q. Those very words? A. Yes, sir.

Q. Was anything said that you were going to get your old job back? A. Not in those words, no, sir.

Q. Very well. They did talk about putting in a sausage department?

The Court: I have heard enough about the sausage.

Mr. Mellinkoff: Very well, your Honor.

(Testimony of Jacob S. Gimpelson)

Q. Now, in your complaint, Gimpelson, you say that your compensation was—you had a salary of \$35.00 per week plus \$15.00 automobile expense, plus 50 per cent of the net profits of the wholesale, and 25 per cent of the net profits of the retail, both computed and paid monthly. Now, that statement is not true, is it?

A. No, sir, it is not. And I had told that to Mr. McCall. He had been on annual leave and he came back on January 6th. I remembered that after I signed it I spoke [52] with Mr. Stephens, another assistant United States Attorney, and mentioned to him that wasn't so—that while it had been computed it had not been paid monthly. Mr. Stephens said it wasn't necessary to amend that—that that was just a quibble of words.

Q. Do you know what the percent of the investment in the present business is, Gimpelson?

A. Will you repeat the first part of the question?

Q. Do you know what the extent of the investment in the present business is?

A. No, I don't.

Q. Do you know what the value of Mr. Kaufman's old business was?

A. No, sir, I really don't. His estimate of its value might be different from mine.

Q. Do you know how to grade meat?

A. What do you mean, do I know how? Am I qualified as an official grader, do you mean?

Q. Can you grade meat?

A. I can tell a good piece of meat from a bad piece.

The Court: Can you grade meat according to the requirements they have developed for grading meat?

The Witness: Yes, sir, I know that they have first grades, prime, choice, good, commercial, utility.

(Testimony of Jacob S. Gimpelson)

The Court: Can you tell the difference between them? [53]

The Witness: Yes, sir, I can.

Q. By Mr. Mellinkoff: How do you tell the difference between first grade and second grade?

A. It is pretty difficult. You can tell the difference between prime and choice. Also the young cattle will usually cut out to a better percentage.

Q. Morris Kaufman was in the business before you left for the Army, was he not? A. That is right.

Q. Did you know at that time that Morris Kaufman had previously been a partner of Max Kaufman?

A. Yes, sir. I knew that many years ago before I had come in.

Mr. Mellinkoff: That is all for the present time, your Honor.

#### Redirect Examination

By Mr. McCall:

Q. Did you after leaving the employment of the company or after April 1946, go to work for the Office of Price Administration? A. Yes, sir, I did.

Q. When did you go to work there?

A. September 12th.

Q. Are you working there at the present time?

The Court: When? [54]

The Witness: September 12th, sir.

Q. By Mr. McCall: Are you working there at the present time?

A. I am working for the Office of Temporary Controls which is under the Office of Price Administration.

(Testimony of Jacob S. Gimpelson)

Q. Have you computed how much you have received in wages during 1946? A. Yes, I have.

Q. How much is it? A. I believe it was—

Q. You can look at your figures.

Mr. Mellinkoff: What is he looking at?

Mr. McCall: Something he wrote up.

The Witness: You can look at it, too, sir, if you want to. This is a withholding statement from the Government.

Q. By Mr. McCall: How much did you make at the OPA in 1946? A. \$810.10.

Q. How much did you make in your employment with Mr. Kaufman?

A. I believe my earnings were \$520.00 plus \$200.00 for vacation, making \$720.00.

Q. And did you have any other earnings during the year 1946? A. Yes, sir. [55]

Q. Your total earnings then amounted to what?

A. \$1,530.00.

The Court: Counsel, what were his earnings for 1945?

Mr. McCall: Did you have any earnings in 1945?

A. The earnings of a sergeant in the Army.

Q. Other than that? A. No.

Q. That is all the money you received since you came out of the Army? A. Yes, sir.

Q. Up until January 1st? A. Yes, sir.

Q. What is your rate of pay down there?

A. My rate of pay is \$3,397.20 per year.

Q. Do you know how much that amounts to per week or pay period or month?

A. Well, I receive approximately \$223.00 every two pay periods, \$11.66 every two weeks.

(Testimony of Jacob S. Gimpelson)

Q. Let me ask you, was the business of Max Kaufman or this company continued at the same location so long as you were there? A. Yes, sir.

Q. Is it there at the same location now or not?

A. I believe that—I am sure that they operate the retail store there. I believe that they have moved the [56] wholesale to their new business, to their new building.

Q. Where is that now?

A. That is, I understand, on Fremont off of Temple.

Q. Now, the officers of the company—do you know who they are?

A. Yes, sir. I believe they are Mr. Max Kaufman, Mr. Morris Kaufman and Mr. Joseph Kaufman.

Q. I mean the offices which they hold?

A. Mr. Kaufman, as I understand, is the president.

Q. That is Max Kaufman?

A. Max Kaufman, yes. Mr. Joe Kaufman, I believe, is vice president, and Mr. Morris Kaufman is secretary and treasurer. That is my belief, sir.

Q. With respect to these allowances that you were speaking of, \$8.00 and \$15.00 a week, was there any accounting made of that or was that just actual money every week paid to you without any accounting?

A. Well, I don't know exactly how you mean "without any accounting." It was money given to me—whether I spent it or not it was money which was given to me each week.

The Court: You were supposed to spend it, were you not? You were using that for promotional purposes?

The Witness: Well, not necessarily, sir. Sometimes I didn't spend a dime and sometimes I spent 20 cents of

(Testimony of Jacob S. Gimpelson)

that. [57] Mostly it was just a form of compensation. It wasn't exactly an expense account.

Q. By Mr. McCall: In other words—

The Court: You did not pay any tax on it, did you?

The Witness: No, sir, I did not.

The Court: Let us not waste any time on that, counsel.

Q. By Mr. McCall: When did you first contact the Selective Service System about this matter?

A. I would say about a week after I had the talk with Mr. Kaufman and I had gone up to see Mr. Mellinkoff. I had requested an appointment with Mr. Mellinkoff to see if this couldn't be straightened out amicably and Mr. Mellinkoff told me he would see me in court, so then I went to the Selective Service Board and asked them to take steps to reinstate me to my former position.

Mr. Mellinkoff: I object to that. I do not see the materiality of any of this. I think we are getting far afield. We know that he took steps because we are here in court.

Mr. McCall: You admit he didn't show any laches? That is the point. Not guilty of any laches—no delay?

Mr. Mellinkoff: No. We are in court today and he just left there in April.

Mr. McCall: I believe that is all, your Honor.

Mr. Mellinkoff: May I ask something further, your Honor? [58]

The Court: Yes.

Mr. Mellinkoff: Just a few questions.

(Testimony of Jacob S. Gimpelson)

Recross Examination

By Mr. Mellinkoff:

Q. When you left the business in April, Gimpelson, that was April of 1946, didn't you go into some other business? A. No, sir, I did not.

Q. Weren't you in some kind of manufacturing business? A. No, sir, I was not.

Q. Didn't you tell people that you were going into business?

The Court: We don't care what he told people.

Q. By Mr. Mellinkoff: Now, one further point, Gimpelson. When you came back and saw Mr. Max Kaufman after your vacation, was anything said about your going back to work for your \$40.00 or \$55.00 a week?

A. He told me that he had nothing at all for me unless I chose to buy shares of stock in the corporation.

Q. When he said that wasn't he referring to your demands for a percentage?

A. I don't know what he was referring to. Those were his words.

Mr. Mellinkoff: That is all.

Mr. McCall: One further question, your Honor. On [59] the computation of this profit.

Q. By Mr. McCall: Was that made monthly?

A. We took a profit and loss statement each month and that was as far as we broke it down. It was simply to figure 50 per cent of that profit and loss statement of the wholesale and 25 per cent of that profit and loss statement of the retail. I knew about how much I was supposed to be making.



(Testimony of Jacob S. Gimpelson)

Q. So that was based on a profit and loss statement each month?      A. Yes, sir.

Q. And then the whole amount was paid at the time you went into the service?

A. Yes, sir. Mr. Kaufman said the finances of the business were not too strong and he requested that I leave that profit in the business.

Mr. McCall: That is all.

The Court: We will take a short recess.

(Short recess.)

The Court: You may proceed.

Mr. McCall: Mr. Silverman, will you take the stand?

HARRY SILVERMAN,

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows: [60]

The Clerk: State your full name.

The Witness: Harry Silverman.

Direct Examination

By Mr. McCall:

Q. Mr. Silverman, are you a resident of Los Angeles?

A. Yes, sir.

Q. How long have you lived here?

A. About 24 years, going on 25.

Q. What is your present occupation?

A. I am superintendent and manager of a cemetery.

Q. Which cemetery?

A. The Home of Peace Cemetery.

Q. For how long have you had that position?

(Testimony of Harry Silverman)

The Court: That is enough. Let us get down to what you want to find out.

Q. By Mr. McCall: Did you work for Max Kaufman during the period 1940 to 1942, any time in that period? A. I did.

Q. What?

Mr. Mellinkoff: Speak a little louder.

Q. By Mr. McCall: What position did you hold—what did you do? A. I was salesman.

Q. Outside salesman? A. Yes, sir. [61]

Q. For the wholesale business?

A. That is right. And in the mornings I was the outside salesman and in the afternoon I would come in and work inside.

Q. When you were working inside did you work in the retail store or wholesale? A. Wholesale.

Q. Did you come in after Mr. Arou left?

A. Well, it goes beyond that.

Q. You mean you were working there?

A. I was working there before and then when I went in the service I understood that Mr. Arou took my place.

The Court: Not what you understood. Just tell us what you know.

The Witness: Well, I know he had my place when I came out of the service. I was given my place back again and Mr. Arou went in the service.

Q. By Mr. McCall: As salesman what territory did you cover?

The Court: What is the materiality of that?

The Witness: West side of town.

Mr. McCall: I am trying to locate him, who he was.

(Testimony of Harry Silverman)

The Court: Well, he is present and pretty well located. He is located at a cemetery now.

Q. By Mr. McCall: While you were working there who [62] directed your activities, Mr. Silverman?

A. Well, Mr. Kaufman and Jack.

Q. Mr. Gimpelson you mean?

A. That is right.

Q. Jack Gimpelson? A. That is right.

Q. In other words, Mr. Gimpelson gave you such orders as Mr. Kaufman didn't give you?

A. That is right.

The Court: Mr. Kaufman was the boss, though, wasn't he?

The Witness: Yes, he was.

Q. By Mr. McCall: Did Mr. Gimpelson give you price figures and things of that type to quote?

A. Yes, he did.

Q. And did he tell you what to do and did you do it?

A. That is right.

Mr. McCall: I believe that is all, your Honor. I put this man on because he needs to go back out there and attend to that business.

The Court: Yes, he might lose some of his clients.

Mr. Mellinkoff: Just a moment. You are a cousin of Gimpelson, are you?

The Witness: That is right.

Mr. Mellinkoff: That is all.

The Witness: Also Kaufman is my uncle. I am a very [63] reluctant witness.

(Testimony of Harry Silverman)

Cross Examination

By Mr. Mellinkoff:

Q. What were your inclusive periods in the business, Mr. Silverman?

A. Oh, up until I went in the service—I don't remember exactly when I first started there. I think when Mr. Asimow was there before and when he left I took his place.

Q. About when was that?

A. I can't recall. Maybe Mr. Asimow can.

Q. Then you left the business when?

A. I came back from the service—

Q. No, I mean when you went into the service. When did you leave the business?

A. When I went into the service?

Q. Yes.

A. I was inducted March 4th, I think, of 1941.

Q. And this Joe Arou, he was working there prior to the time you left, wasn't he?

A. That is right.

Q. Were you both selling in the same territory?

A. No. Joe Arou was a truck driver.

Q. Did he drive you around?

A. No. I didn't operate from a truck. I operated [64] from my own car.

Q. And then you came back when?

A. I think it was about October or November of 1941. It was just before Pearl Harbor.

Q. You came back October or November of 1941?

A. That is right.

Q. I didn't understand—what was the date you went in?

A. The service?

(Testimony of Harry Silverman)

Q. Yes. A. March of 1941.

Q. Oh, I see.

The Court: The war did not last very long for him.

Q. By Mr. Mellinkoff: Then how long did you stay with the business after you came back?

A. I don't recall. I think it was maybe '43, sometime in '43 or '44. I don't remember.

Q. When you came back in October or November of 1941 Gimpelson was still there, is that right?

A. When I came back? Yes.

Q. And what were you doing at that time, when you came back?

A. I came back and went to my old job of calling on restaurants.

Q. On the west side of town? [65]

A. That is right.

Q. Was Gimpelson doing anything—was he selling?

A. Yes. He was selling downtown.

Mr. Mellinkoff: No further questions.

The Court: That is all.

#### Redirect Examination

By Mr. McCall:

Q. Did you work for Mr. Max Kaufman at the Fairfax market? A. Yes, I did.

Q. Was that prior to the time that you came to work at the Temple Street place?

A. Yes, it was. I think it was about '39, if I remember, '39 or '40.

Mr. McCall: That is all.

If your Honor please, that is the petitioner's case in chief except for some figures which I asked Mr. Asimow,

the accountant, for, and which the respondent is to produce, as to the profits and losses made during the period 1946.

I have not been able to—I haven't had an opportunity to go over the figures with Mr. Asimow and it is my supposition that the defendants will probably put him on. I would like to at this time close the petitioner's case in chief with the right to put Mr. Asimow on in case I [66] have had an opportunity to talk to him about the profit and loss statements. Is that all right with you?

Mr. Mellinkoff: Sure.

At this time, your Honor, I move to dismiss the complaint on file here on the ground that it has not been shown that there was—on the ground, your Honor, that it has not been shown that within 90 days after the petitioner's discharge from the service he made application for restoration of his old position.

The petitioner was discharged from the service on November 6th, 1945. His period for application for re-employment would expire February 6th, 1946, and the testimony so far in this case is all to the effect that up until the middle of February of 1946 there was no discussion whatsoever in regard to the profit-sharing arrangement. That is the real bone of contention in this case.

The fact of the matter is that the veteran came back, he was given a job by his former employer—

The Court: Let us not argue the case now, counsel. You will have an opportunity to argue the merits of the case later.

The testimony of the petitioner is that he complained from the start because he was not given his old job back.

I think there is sufficient evidence here to place the respondent on its defense. The motion will be denied. [67]

Mr. Mellinkoff: That motion was in regard, your Honor, to the defendant Max Kaufman and the respondent Max Kaufman. There are two respondents in this case, the corporation, Chicago Hotel, Restaurant & Meat Supply. As to the corporation I move to dismiss on the same grounds and on the additional ground, your Honor, that there had been no evidence or testimony to the effect that this corporation is an alterego of Max Kaufman. There has been no testimony that there was application for re-employment to the corporation. As a matter of fact, the admissions have been that there was additional money put in here and the only testimony by the petitioner of any identity whatsoever has been to the effect that the respondent Max Kaufman and his two brothers are the officers of the corporation.

Aside from that there has been nothing to indicate any responsibility or liability of the corporation as such.

The Court: What have you to say to that?

Mr. McCall: If your Honor please, this corporation is the successor to the business.

The Court: That would not make any difference. You have alleged it is the alterego but there has been no evidence to that effect. There has been no evidence here the corporation was ever the employer of this petitioner.

Mr. McCall: Yes. The employment continued under the corporation there for about a month. In other words, he was [68] taken in.

The Court: It was about April 1st, as I understand, that the corporation came into being. And when it came into being has only been by the statement of the petitioner that Max Kaufman came in and said he was the president.

Mr. McCall: That is correct.

The Court: That is the only evidence as to when the corporation took over the business.

Mr. McCall: That is correct. And the statement his pay was divided that week between Max Kaufman and the corporation.

The corporation, if your Honor please, is the successor of this business, just as in the Trailmobile case, which was decided by the Third Circuit Court of Appeals, where the subsidiary corporation was wiped out and the business was consolidated and merged under the parent corporation.

It was held that the parent corporation under those circumstances had become and was employer of these men.

The Court: But that was a different situation. That was a case where there was a merger of the corporation. There was a subsidiary corporation and there was a parent corporation, and they were consolidated.

Mr. McCall: That is correct, sir. I want to cite [69] also in support of the theory that this corporation is liable the United States Supreme Court case of—the Fishgold case where it held that the employer and some other group cannot deprive the veteran of his re-employment rights or diminish them in any manner. That is the holding in the Fishgold case.

Now, we have here a case, if your Honor please, of a man who had a right to a job in the employ of the employer; that he came back and was re-employed and within the course of the re-employment a corporation was formed which continued that same business. The original employer is simply merged into that and his affairs gone right on through and he is the president of the corporation. He was obligated to employ this man for a year and not to discharge him without cause. He did re-employ him, took him back into his employ and all the



parties, it may be assumed from the proof here, who entered into that corporation knew all about the situation.

The Court: But, Mr. McCall, here is the situation. Two men came into the business and put their money into it. Now, are these men to lose their profits because the man they entered business with had an arrangement providing for 50 per cent and 25 per cent division of the profits? That might hold against Kaufman, but how about the other men who are strangers to this man's employment?

Mr. McCall: If your Honor please, if the law means any- [70] thing—

The Court: Gentlemen, I will tell you what I am going to do. I am going to hear the evidence and let you brief the matter of facts. I cannot understand why, when there has been the relationship that existed between these people for all these years, they haven't been able to adjust the matter instead of coming into court and venting their spleens.

Mr. Mellinkoff: We tried to.

The Court: I think it should be adjusted. Common decency requires it. There has been a lack of cooperation on the part of either or both parties or one or the other in an effort to bring about a fair adjustment of this case.

As a matter of fact, this man would probably have been better off in the long run if he had gone back to the business and stayed there because the obligation is only for one year.

There have been a number of defenses here that may take care of it. It seems to me that counsel and the parties could spend a little time around the table and see if they couldn't adjust this between themselves. All that can be done now is a financial adjustment.

As I understand the evidence, the business has been separated. There is now a retail store and a wholesale store and it would not be possible for this respondent to be [71] manager of both places. It seems to me there should be some adjustment. My statements are not a reflection on any of these parties who got along so well for so many years together. Somebody is stubborn. I don't know whether it is the lawyers or whether it is the parties.

Mr. Mellinkoff: We can try it again, your Honor, during the recess. There has been an endeavor to draw this to an amicable solution, and that is certainly to be desired.

The Court: Because if the petitioner is entitled to a judgment in this case it will probably mean an accounting and a substantial amount. On the other hand, if the petitioner is not entitled to anything that is something else. If it goes one way he loses everything, and if it goes the other way the employer loses everything.

Now, when there is a dispute and a lawsuit it seems to be that there should be some basis upon which the parties can adjust their differences. There is a moral obligation here. There is no question about that.

The business here was operating at a good profit during the war period while this boy was overseas and that should be taken into consideration. Those who stayed at home and made money can afford to be fair with this man that went across the seas and that is the way I am going to approach this question. There may be legal barriers because of which he cannot recover. I don't know. And there may [72] be a way whereby he can recover and under those circumstances I think it would be good business on the part of both parties to end this litigation by some kind of an adjustment.

Here is a boy that this man has raised, in a sense, in the business.

Mr. Mellinkoff: That is right.

The Court: And they should not be here in a family quarrel. They should not be here. Somebody has been unfair. I don't know who. Here is a man who has an established business. He has a reputation in the community for having kicked out his own nephew that he practically raised because he found it not convenient to furnish him employment when he comes back. He must have some self-respect in that regard. On the other hand, the petitioner has some obligation in this case because of the relationship between them. Your uncle has done a lot for you in times gone by. He has given you some opportunities. You should take that into consideration.

I think that these two men should go out and keep the lawyers out of it and everybody else and settle their differences. That is what I think should be done. I don't know whether to blame it on the lawyers. I don't know whether there is too much interference or not. Sometimes I think there is in these cases. And I think that both of [73] them should be able to settle it on a basis that when they get through they can shake hands and forget their dispute here in this courtroom. One is an old man and one is a young man. One is too old to fight and the other was young enough to fight. One made the money while the other was fighting. Now, there ought to be a common basis upon which these parties can get together. I don't know which one it is that wants to fight. I don't know whether you had enough fighting during the war or whether you still want to fight, or whether you still want to see if this cannot be adjusted in a manner that will be fair.

He certainly is not entitled to the profits of a business that has been augmented by additional capital. That is a certainty. It wouldn't be fair and wouldn't be just. And I think these parties can come nearer doing the just thing and the fair thing between them, that will be fair in the long run, fairer than any decision this court can give because when this court renders a decision it is going to hurt somebody. Not necessarily when I am looking at you—I don't mean necessarily going to hurt your client. It is just as likely to hurt the petitioner in this case.

This is one of those cases that is a toss-up. It could very easily be decided either way. It has been the policy of this court to give the petitioners the break. In other words, give the evidence a liberal construction. On [74] the other hand I can see very easily there are some very definite legal barriers that may preclude this veteran from making a recovery.

If decided here it may go to the Circuit Court. It may be affirmed. It may be reversed. A decision will come down two years hence and in the meantime hard feelings have developed and been engendered between these people when there should be good feelings. This situation should not have been permitted to develop.

I am going to adjourn the case until two o'clock. I would like Max Kaufman and the petitioner to go out and have lunch together and see if they can't sit down at a table and settle this matter like father and son should settle their disputes. Both should be willing to give and take and when you get through settling it shake hands, come back and tell me you have done so. We will recess now until two o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was had until 2:00 o'clock p. m. of the same day.) [75]

Los Angeles, California, January 10, 1947, 2:00 P. M.

The Court: You may proceed.

Mr. Mellinkoff: May it please the court, I believe we will have to proceed with the case.

The Court: Proceed.

Mr. Mellinkoff: Mr. Asimow.

WILLIAM E. ASIMOW,

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: William E. Asimow.

Direct Examination

By Mr. Mellinkoff:

Q. Do you know the petitioner in this case?

A. Yes, sir, I do.

Q. Do you know the respondents?

A. Yes, sir.

Q. Are you the accountant for the respondents?

A. Yes.

Q. How long have you been in the employ either of Max Kaufman or of the respondent corporation?

A. Well, when you say "employ" you mean as public accountant or as an employee? [76]

Q. Well, how long have you had a business association with either of the respondents?

A. Since 1929.

Q. Since when? A. 1929.

Q. In 1941 were you the accountant for Max Kaufman? A. Yes.

Q. Do you know what the pay of the petitioner Gimpelson was at that time?

(Testimony of William E. Asimow)

A. Well, as stated in the Social Security records—I don't recall the exact amount.

Mr. McCall: I don't think there is any question about that, your Honor. It was testified to this morning by the petitioner himself.

Mr. Mellinkoff: Is it stipulated that the—

Mr. McCall: He testified in accordance with the figures there.

Mr. Mellinkoff: —that the pay of the petitioner for the time shown in these records is as shown in these records?

Mr. McCall: It has already been proved. There is no question about it.

The Court: I don't think there has been any dispute on that. What I am interested in is the pay he was receiving in the position he held at the time he entered the service.

Mr. Mellinkoff: That is in these records, your Honor, [77] as far as his regular pay is concerned.

The Court: Yes.

Q. By Mr. Mellinkoff: Were you present, Mr. Asimow, when the settlement was made between Max Kaufman and Gimpelson just prior to the time that Gimpelson went into the service? A. Yes, I was there.

Q. Would you state to the court in your own words what took place at that time?

A. I presented a profit and loss statement showing the profits for the period March 1st to, I believe September 1st. I may not be exactly sure of those dates.

(Testimony of William E. Asimow)

Q. September 1st or 30th?

A. September 30th, I believe. And we used that base as a base for effecting a settlement and I was the arbitrator between them.

Q. And what amount was agreed upon?

A. They agreed to settle for \$2,500.00 all outstanding differences between them.

Q. Was that more or less or the same than 50 per cent of the profits of the wholesale and 25 per cent of the profits of the retail as shown by that statement?

A. It was less.

Q. Was there any statement made at that time by either party to the effect that this arrangement was one that was [78] to continue?

A. You are asking me to state my opinion?

The Court: Not your opinion. What was said?

The Witness: Well, as I recall it, after the amount had been agreed upon between the parties, Kaufman drew a check or had me draw a check for \$1,500.00, and Jack agreed to accept the balance in weekly payments to his mother. They shook hands on the deal and they seemed to be very friendly at the time. I don't—the only understanding, I think there was between them at that time as to the future relations, was that when Jack got out of the Army there would always be a place for him if he wanted to come back. Under what conditions he would come back, that is, percentage-wise, there was no definite understanding as to that.

The Court: There wouldn't have to be. The law fixes that.

Q. By Mr. Mellinkoff: Now, prior to the period covered by this statement, did Gimpelson receive anything

(Testimony of William E. Asimow)

by way of percentage of the profits of Max Kaufman's business?      A. No.

Q. No, prior to the war were you—I will reframe that question.

Are you familiar with the general operation of Max Kaufman's business—were you prior to the war?

A. From an accounting standpoint, yes. [79]

Q. What is that?

A. From an accounting standpoint.

The Court: Speak up.

The Witness: From an accounting standpoint.

Q. By Mr. Mellinkoff: Well, up into 1940 you actually worked in the business, didn't you?

A. That is right.

Q. From your knowledge of Max Kaufman's business, let us say up until 1940, can you say who ran the business?

A. At the time I left it was definite that Kaufman was the boss there. There was no question of it in 1940.

Q. Did you know Gimpelson at that time?

A. Yes.

Q. Prior to the time you left the business as such to become the accountant for the business did you give Gimpelson any instructions as to any operation of the business?

A. No. We both took our instructions from Kaufman. I don't think there was a question of either one giving each other instructions. We worked together.

Q. Did you tell Gimpelson anything about sales routine?

A. When I first came to work for Mr. Kaufman—



(Testimony of William E. Asimow)

The Court: Counsel, I do not care anything about that. It has been admitted, I think, that this man was employed at the time he entered the service at a certain figure and under [80] certain conditions—\$35.00 a week and a certain percentage of the profits.

Now, he was entitled to be restored to that position unless he comes within the exemption, upon his having a certificate of having completed his service in the Army. I mean his service in the Army.

I have given the parties an opportunity to settle their differences. The thought I have in mind is this, that up until the date of the incorporation, at which time apparently there was a change, new capital came in, and there was a new organization. I think unquestionably that this petitioner was entitled to his wages and his percentage of the profits up until the time of the incorporation.

Mr. Mellinkoff: Doesn't your Honor take into consideration the fact that the statute makes an exemption for a change in the circumstances of the employer?

The Court: I say subject to any exemptions that may exist that have not been developed.

But the question the court is really interested in now is whether there has been a change in the condition of the employer such as would make it impractical to re-employ the petitioner, but there has to be a pretty strong, compelling reason for that.

Mr. Mellinkoff: Right.

The Court: Now, if this man was still operating his business and the petitioner was entitled to be restored to [81] his former position, and of course it is all subject to evidence and I am only making this statement so you will confine your evidence to the points the court has in mind,

(Testimony of William E. Asimow)

but a change in that business occurred, a corporation was formed and there was a change in ownership, and if it is true outside capital came in, that may be such change that there would be no liability after that period. But there would have to be pretty strong, compelling reasons why prior to April 1st he should not have been restored and received his wages and a percentage of the profits during January, February and March.

Mr. Mellinkoff: Very well, your Honor. On that assumption I will concentrate only on such changes of circumstances as existed prior to that time, prior to this date in April.

The Court: I would like for the accountant to tell us what the profits of the business were in the Temple Street market, I presume, for the first three months of 1946.

Mr. Mellinkoff: Could I come to that in just a moment, your Honor?

The Court: I will let you approach it the way you want, but that is some of the information the court wants.

Mr. Mellinkoff: That will be in evidence before this witness is through.

Q. Mr. Asimow, are you familiar with the property from [82] which Mr. Kaufman conducted his business?

A. Yes, sir.

Q. What property did that consist of?

The Court: Can't it be stipulated to? Is there any question about it that the original property was condemned and it was necessary to vacate those premises? Can't the date of that vacation be agreed upon?

Mr. McCall: I understand they are still operating there.

(Testimony of William E. Asimow)

The Court: I understand they are operating a retail market in one place and a wholesale market in another place.

Mr. McCall: But they still occupy the same property.

The Court: But there was a division of their business.

When you move a wholesale plant to one place and the retail plant in another place that is a physical division.

Mr. Mellinkoff: May it please the court, I offered to make such a stipulation to save time with counsel, and I will renew that offer at this time. I would like to have it stipulated that on December 14th, 1944, a condemnation suit was filed affecting what is known as Parcels No. 10, which was the truck lot immediately adjacent to the buildings used by Kaufman; that the property, the lots there were owned by Mr. Kaufman personally and judgment of condemnation was entered in that case on the 30th day of October, 1945. I would like that as one stipulation if it may be stipulated [83] to.

Mr. McCall: If your Honor please, we have no knowledge of it and I do not consider it material one way or the other.

The Court: I don't care what you consider material. The court considers it material that if these premises were vacated there should not be any—

Mr. McCall: They were not vacated, your Honor. That is the point. They were still there.

The Court: Do you want me to dismiss this case and throw it out of court in a hurry?

Mr. McCall: No.

The Court: Then do some of the things I want done.

Mr. McCall: All right. I want to know of course if you want a stipulation such as indicated we will send and

(Testimony of William E. Asimow)

get the record, but I do not care so much about the condemnation. I want to know when Mr. Kaufman vacated any portion of these premises.

The Court: A judgment of condemnation does not mean anything if they are permitted to remain. As I understand from the testimony here they are still operating the retail market on part of this property.

Mr. Mellinkoff: On the leased part, that is correct, your Honor, and they are subject even as far as the retail business there is concerned to vacate that on 30 days notice. [84]

The Court: That does not make any difference; they are operating there.

Mr. Mellinkoff: Yes, that is correct.

The Court: Are you willing to stipulate that they are still operating their retail market at that location?

Mr. McCall: Yes.

The Court: All right. Now, when did they move the wholesale business to the other location?

Mr. Mellinkoff: Can you testify to that, Mr. Asimow?

A. I don't know the exact date.

Mr. McCall: About October this year—1946.

The Court: October 1946?

Mr. McCall: Yes.

The Court: Will you ascertain that from your client?

Mr. Mellinkoff: I am informed, your Honor, that insofar as the large cooling room and this new location on Fremont, that that has been in use for approximately nine months and as far as bag and baggage every last vestige of the wholesale business that was moved was moved approximately three months ago.

The Court: All right, go ahead.

(Testimony of William E. Asimow)

Q. By Mr. Mellinkoff: Mr. Asimow, do you know whether or not prior to the incorporation of the respondent corporation, whether or not any additional capital was put into Max Kaufman's business from others than Max Kaufman? [85]

A. Yes. Additional capital was put in in November. They went into escrow on the property across the street with funds advanced by Joseph Kaufman.

Q. How much money was put in?

A. I believe he put in \$6,000 at that time.

Q. What is that? A. \$6,000.

Q. Who put in \$6,000? A. Joseph Kaufman.

Q. Did Morris Kaufman put in anything?

A. At a subsequent date Mr. Morris Kaufman put in \$5,000.

Q. Was that before the incorporation or after the incorporation?

A. That was before the incorporation or, now, the \$5,000 may have come in shortly after the charter was issued, but all this money came in before the books were set up for the corporation.

Q. When were the corporate books set up?

A. I was requested to set them up February 1st, but I did not set them up until April 1st.

The Court: When did the corporation take over the business?

The Witness: It would be April 1st.

Q. By Mr. Mellinkoff: And prior to April 1st, \$11,000 [86] had been put in by Joseph and Morris Kaufman.

A. Yes, and an additional fifteen came in before April 1st from Joseph Kaufman.

(Testimony of William E. Asimow)

Q. An additional \$15,000?

A. Yes, sir; there was \$26,000 at the date of incorporation.

The Court: In the incorporation how were the shares divided?

The Witness: 40 per cent to Max Kaufman and 30 per cent to Joseph Kaufman and 30 per cent to Morris Kaufman.

The Court: And the corporation took over the individual business of Max Kaufman as of April 1st?

The Witness: Yes, sir.

The Court: And your report of earnings have been based on that?

The Witness: Yes, sir.

The Court: All your accounting has been based on that?

The Witness: Yes, your Honor.

Q. By Mr. Mellinkoff: When was the corporation actually incorporated, do you know that?

A. January 22nd, 1946.

Q. Now, prior to the incorporation of the corporation do you know whether or not there was any understanding between Max Kaufman, Morris Kaufman and Joseph Kaufman as to their relationship in that business? [87]

A. At the time they first discussed the corporation in November of 1945, they agreed that as soon as the charter came through, why, they would consider themselves all members of the same business.

Q. They agreed to what?

A. They would consider themselves as partners, as members of the business. I was advised that the corporation charter had been issued January 22nd, and I was

(Testimony of William E. Asimow)

instructed to begin drawing up corporation books, but I didn't have the time necessary to do it so I suggested that they work out the same basis, the corporate basis and use that as a distribution of the profits for the three months so there would be no misunderstanding between the three of them as to who was to share in the profits the first three months while I was preparing the records.

Q. Do you know how it happened that this new capital came into the business at all?

A. Yes. I was aware of it. As I say, Joseph Kaufman came from back East in November and Max approached him with the idea of putting this capital into the business in order to put up a building because they could no longer continue under their present circumstances and he felt that if he—that he would rather go out of business than risk his own capital in this new venture and that if Joseph Kaufman, who was looking for a proposition at the time, was interested [88] they would all pool their resources and put up this building and incorporate it and so share the responsibilities and the risk involved.

Q. How did Morris Kaufman figure in these plans?

A. Morris Kaufman had been a valued employee of Max Kaufman and it was the understanding that he was to also have—

Mr. McCall: Your Honor, I don't want to object too much, but I do object to the use of the word "understanding". This witness is telling what the understanding was between these men.

The Court: I have been waiting for you to object because I don't think any of this is material. None of it is binding upon the rights of the veteran.

(Testimony of William E. Asimow)

Mr. Mellinkoff: Very well, your Honor.

Q. Now, drawing your attention, Mr. Asimow, to the period between approximately the 3rd of January, 1946, and approximately, I believe, the 2nd of April, 1946, can you state what the profits of Max Kaufman during that period were?

The Court: You are asking of the individual or the business?

Mr. Mellinkoff: Well, both, if your Honor please.

A. The profit of the business for January 1st to March 31st, before any allocation between the respective [89] parties, was \$9,295.47.

The Court: That was for the entire business?

The Witness: Retail and wholesale.

The Court: What was the wholesale?

The Witness: At that time the business was in a confused state as to the corporation and we made no distinction between the two departments. In other words, records were not kept between the two departments. They were all grouped under one heading, but we estimate that the profit of the retail might be \$2,000 and the profit of the wholesale would be \$7,263. That is subject to inspection and correction. That is just a guess on my part based on prior operations.

Q. By Mr. Mellinkoff: Now, Mr. Asimow, this gross figure here of \$9,295.47, does that take into consideration any allowance of salary to Max Kaufman?

A. No. There is no allowance for Max Kaufman's salary in that profit.

Q. Of your knowledge of the business and with your experienced as an accountant, could you make any estimate



(Testimony of William E. Asimow)

of what a fair deduction from that for salary to Max Kaufman would be?

Mr. McCall: I object to that, your Honor, as being immaterial.

Mr. Mellinkoff: It is very material. [90]

Mr. McCall: And this witness has not been qualified.

The Court: Let me ask this question. When you made the settlement with the petitioner in this case and Max Kaufman was there any consideration as to salary for Mr. Kaufman at that time in estimating it?

The Witness: We discussed it at that time and it was some of the background in arriving at the settlement. We took into consideration depreciation. That was not shown on the statement. And there was mention made of Max Kaufman's salary at the time we settled for a flat sum. There is no way of saying exactly what we used, but we did consider it because I distinctly remember bringing it up as a point. In fact, on a statement that I issued I made a note that Max Kaufman's salary, the profit was stated before his salary and I think they used that as a basis in coming to their \$2,500.

The Court: I will let the evidence go into the record.

Q. By Mr. Mellinkoff: Now, could you answer that question, Mr. Asimow?

A. I don't know that I am competent to answer the question as to his value.

The Court: Then if you are not competent do not answer it.

The Witness: I can guess, if it please the court.

The Court: We are not asking for guesses. [91]

Q. By Mr. Mellinkoff: Now, taking this figure as it is without any further deductions at all, what portion of

(Testimony of William E. Asimow)

that gross sum would you say Max Kaufman would be entitled to under his agreement existing at the time?

A. He would be entitled to 40 per cent of that profit.

Q. And on what basis do you give that answer?

A. Well, the corporate setup was arranged that way, 40, 30, 30, and the first three months of operation were to be taken into consideration.

Mr. McCall: I object. The corporation did not take over until April.

The Court: Let me ask you this: When this money was put into the company did they then act as co-owners of the business until the corporation actually took it over—until you closed the books of the business and set them up in the name of the corporation?

The Witness: They acted in a rather managerial capacity.

The Court: But their interest in the business was the same as in the corporation?

The Witness: That is right.

The Court: So that it was in a sense, until the corporation went into effect, a partnership?

The Witness: It was an unofficial partnership. It was [92] an interim status until the corporation could be effected.

Mr. McCall: I object to the witness' answer as not being qualified to answer that question and I would like to develop some facts so your Honor will understand what the situation was by asking this witness—

Mr. Mellinkoff: May it please the court, I do not think anyone is better qualified than this witness to state what the practical operation of the business was.

(Testimony of William E. Asimow)

The Court: May I ask, was this \$9,000 distributed or was it simply kept in the business?

The Witness: It was kept in the business and was used in valuing the assets for the corporation. It was a definite factor in the transfer of the assets to the corporation.

The Court: I know, but your statement makes it more confusing than ever. These other parties invested money in the business with the understanding that it would be incorporated and the two brothers were to get a 30 per cent interest each?

The Witness: Correct.

The Court: 30 per cent of the stock, and that money went into the business before they were actually incorporated and before the corporation took over the business?

The Witness: That is right.

The Court: In the meantime did the other two men draw salaries? [93]

The Witness: They drew salaries, yes. They were working for—well, they were connected with the business.

The Court: When there was \$9,200.00, approximately, in excess of their salaries in the business?

The Witness: That is right.

The Court: And that continued as a part of the assets of the corporation when you set up the books?

The Witness: No. There was a cut-off date on April 1st, and we valued Max Kaufman's assets by a physical inventory, assigning values to them and transferred them to the corporation and he put high values on certain items and we were to take this \$9,000 into consideration in evaluating those assets by that sum so that they would arrive at a fair settlement between themselves.

(Testimony of William E. Asimow)

They felt that the corporation should be organized when the charter was issued and the business was very profitable for the first three months and they felt they would be cheated unless they had some basis for sharing in those profits. At that time they considered themselves members of the business. At the time it was just a matter of formality that the corporation was not started until April 1st.

Q. By Mr. Mellinkoff: Mr. Asimow, I ask you this: Is there any further deduction or correction of this gross of \$9,000 that you as an accountant feel should be made here? [94]

A. I feel there should be a reasonable allowance for Max Kaufman's salary, to be arrived at by mutual understanding.

Q. Anything else?

A. And the share allocated to the two participants in the corporation.

Q. What about this inventory matter?

A. It was brought to my attention at the time we drew up the statement that the beginning inventory was understated—that is, there had been an understatement from the year before when they put their ending inventory in 1941, which did not include all merchandise, but when the business was transferred they took a physical inventory and presented the proper figures. But I have no way of knowing whether that is right or wrong. I took the figures as they were given to me.

Q. Mr. Asimow, you were present in court this morning when the petitioner testified that he was the meat purchaser for Max Kaufman before the war?

A. Yes.

(Testimony of William E. Asimow)

Q. Can you state of your own knowledge and from your observation of the business who purchased the meats for Max Kaufman before the war?

A. Well, what period are you referring to? How far before the war? I left in 1940. At that time Max Kaufman [95] was the purchaser. After that I am not certain.

Q. Do you know of another market that Max Kaufman had before the war aside from the Temple Street market? A. Yes.

Q. What market was that?

The Court: Fairfax Avenue, Fairfax Street, isn't that right?

The Witness: Yes.

The Court: We have heard enough about that.

Mr. Mellinkoff: One further question, your Honor.

Q. Do you know when Mr. Kaufman sold that market?

A. I am not certain as to the exact date. I believe it was in 1943—perhaps later. I am not sure.

Q. And at any rate it was after Mr. Gimpelson left for the Army? A. I believe so.

Mr. Mellinkoff: That is all for the moment.

### Cross Examination

By Mr. McCall:

Q. Mr. Asimow, when this money you spoke of a while ago—a while ago you spoke of this money being put in escrow. That was put up by Joseph Kaufman, the \$6,000? A. That is right.

(Testimony of William E. Asimow)

Q. "parties participate in the profits"? You mean that they were to acquire that store when the transfer was made?

A. Well, they were to use the profits that had been made—that is, their percentage of the profits as a definite asset in their name.

The Court: Contribution?

The Witness: Contribution.

Q. By Mr. McCall: On this item of the papers to which you are referring, where you read off the three months profit was \$9,295.47, an item appears of salary, \$6,097.30. Does that include the salaries paid to Morris and Joseph Kaufman? A. Yes.

Q. And I will ask you if that is—are those figures—[99] are those the figures which were used in the preparation of income tax report of Mr. Max Kaufman?

A. I haven't prepared his income tax return yet but when we do we will have to distribute the respective shares and Joseph Kaufman will have to report 30 per cent and Morris Kaufman will have to report 30 per cent of that profit on their own individual returns.

Q. These two men at that time were drawing salaries instead of shares? A. That is right.

Q. Now, I will ask you if you have prepared a statement of the net profits of the business since April 1st, 1946? A. Of the corporation itself?

Q. Yes.

Mr. Mellinkoff: May it please the court, I object to that. It is my understanding we are to confine ourselves to the period—

The Court: But I am going to let him make a record if he wants to and then if the Circuit Court wants to re-

(Testimony of William E. Asimow)

view it they will have all the figures and will not have to send it back for re-trial.

Mr. Mellinkoff: I submit it would be prejudicial to the hearing on this case and those figures could be obtained from a master in the event that there would be a decision that [100] those figures were necessary. And additionally, your Honor, any figures that are presently available would be tentative figures because the income tax returns, of course, have not been prepared as yet and I would make that objection to the introduction of those figures at this time.

The Court: If the witness knows what the earnings are he can answer the question. The objection is overruled.

The Witness: The earnings, of course, are always adjusted at the end of the year for physical inventory purposes up to that time.

The Court: You have your inventory?

The Witness: No. This statement we refer to is November 30th. We haven't worked on December as yet.

The Court: It wouldn't be complete, Mr. McCall.

Q. By Mr. McCall: Don't you compute monthly profits and loss statements? A. Yes.

Q. And this is a compilation of those from the beginning of the company down through November?

A. Not necessarily accurate. They are just a guide. At the end of the year, of course, we make all the final adjustments and might materially change it and might not—accruals and adjustments and other things.

Q. As of November 1st—from April 1st, 1946 what were the net profits of the company as of November 1st? [101]

(Testimony of William E. Asimow)

Mr. Mellinkoff: Now, may it please the court, I object to that because the witness has stated that these figures are not—

The Court: Objection sustained.

Q. By Mr. McCall: Do you have the monthly profit statements? A. This is a monthly—

The Court: Counsel, it isn't going to do me any good unless I have the balance of the year and he hasn't those figures. It would not mean anything to me one way or the other and wouldn't mean anything to you. It would only be a part of the year.

Mr. McCall: I thought I might be able to get that.

The Court: We are not trying to satisfy our curiosity here. If he could give us an accurate figure to January 1st, I would permit it, but he says he hasn't those figures, and I do not care for a part of it. That would not mean anything.

Q. By Mr. McCall: How long will it take you to compute the figures to January 1st?

A. I would have to close the books of the corporation and make an audit. I imagine it might take another month.

Q. About a month before you could get the accurate figures?

A. I would say two to three weeks anyway. [102]

Q. How much was paid for that property out there?

The Court: I think that is immaterial, counsel. We are not inquiring into all the business of these people. After all, it is a private business.

Mr. McCall: I am interested, your Honor, in—what I am trying to find out about is the total amount as com-



(Testimony of William E. Asimow)

pared to the amount of money that was put in here by the brothers.

The Court: If the stock was divided into certain proportions, one received 40 per cent and the other two 30 per cent each that would indicate the present ownership.

Q. By Mr. McCall: Mr. Asimow, do you know whether or not Max Kaufman drew weekly checks from the business?

A. He probably did but they were charged against his drawing account and never charged against the profits of the business.

Q. What do you mean? Do you show on any of these figures his drawing account?

A. Well, we have it in the balance sheet, showing his net withdrawals from capital, but the drawings of a private individual is never charged against the profit of a business.

Q. You mean the amount that he might have drawn weekly or otherwise would not appear on this statement?

A. No, sir, not until it was incorporated and he became an employee of the corporation. Then it became an officer's salary. [103]

Q. Do you know how much he drew during that period?

A. He drew out amounts—sometimes he would draw an even amount—sometimes draw \$1,000. It had no relation to the business whatever. He drew what he wanted or needed.

Q. Was that true during this three months period?

A. Yes. He was still operating in the manner of an individual and drew accordingly, and paid his income tax on his drawings. Of course now that it is a corporation

(Testimony of William E. Asimow)

he restricts himself to personal payments out of his own personal account.

Q. Do you have any records that would show the date on which these different sums of money were paid?

A. Different sums?

The Court: Paid to whom?

Mr. McCall: Sums of money paid by Morris and Joseph Kaufman.

A. I would have to inspect the record. You are referring to the five and six and fifteen?

Q. By Mr. McCall: Yes; the dates on which they were paid.

A. I don't have the exact dates with me. We could obtain them. I do know that—I believe the first deposit would have been in November, I believe, and subsequent contributions were during the three months period. I would be guessing. I would have to inspect the record. [104]

Q. By Mr. McCall: In other words, you don't know? You haven't got the dates?

A. That is right. If you ask me within a certain period I could definitely state, but not the exact dates, no.

Q. You don't know whether Joe Kaufman was drawing any salary out of the business from January 1st on through or not, do you?

A. He drew a salary. I don't know whether it started January 1st, but I believe he drew a salary starting in

(Testimony of William E. Asimow)

February. Now, I am not certain of the exact date of that, but I do know he drew a salary in March and probably a good part of February. I am not sure if he drew any in January. I think he was back east at the time.

Q. Were you in on any of the conversations between Mr. Joe Kaufman and Morris Kaufman and Max Kaufman about the proposed organization of this company?

A. Yes, I was in on them.

Q. When?

A. Oh, I think the first time they asked me to come over was in November.

Q. Who was present?

A. Morris Kaufman, Joe Kaufman and Max Kaufman. At that time I was attempting to obtain fifty-one per cent of the corporation stock for Max Kaufman, but the other two thought that was too much. [105]

Q. This was in November?

A. I believe it was.

Q. What other conferences were you in on?

The Court: What materiality is that?

Mr. McCall: I am trying to find out what he means by the understanding.

The Court: They put in money. There was a change of condition. The corporation actually took over on April 1st. I don't want to keep you people here all night while you stand up and scratch around for questions to ask.

Mr. McCall: I will stop right now, your Honor.

The Court: And the same applies to you, counsel.

Mr. Mellinkoff: Yes, your Honor. I have just a few questions.

(Testimony of William E. Asimow)

Redirect Examination

By Mr. Mellinkoff:

Q. Mr. Asimow, can you state to the court what Mr. Gimpelson has been paid since he returned from the service?

A. I believe the record will show that—I think it was \$40.00 a week.

Q. How much?

A. \$40.00 a week, and I think his last check was \$55.00.

Q. And what about the figure of \$200.00?

A. And \$200.00 before he left, yes. Mr. Kaufman paid [106] him that personally. There was no record of that on the books, but Mr. Kaufman paid it out of his own personal funds.

Q. What about weekly payments of \$25.00 by Mr. Kaufman personally?

A. Well, I would just have to repeat hearsay. Mr. Kaufman told me—

The Court: I don't want any hearsay.

The Witness: I don't know for a fact.

Mr. Mellinkoff: I have no further questions, your Honor.

The Court: That is all. Call your next witness.

Mr. Mellinkoff: Before the witness leaves the courtroom, however, I would like to say if there are any questions concerning any figures and so forth, I would like them asked of Mr. Asimow now before he leaves because he, rather than the other witnesses, is the one who knows about these figures. As far as I am concerned, Mr. Asimow can go. He is anxious to leave.

The Court: Very well.

(Testimony of William E. Asimow)

Mr. McCall: Let me ask one thing.

The Court: Any more question of this witness?

Mr. McCall: I want him to identify these papers as being the papers on which settlement was made in 1942. [107]

Recross Examination

By Mr. McCall:

Q. I will ask you if these papers were prepared by you showing profit and loss statements of this business, retail at 927 Temple and wholesale at 925 Temple?

A. Yes, sir.

Q. For the months of March to and through September, 1942? A. They are.

Q. Are they the papers on which that settlement was based? A. I think so.

Q. You prepared the papers?

A. That was five years ago but I believe—they look like the ones I prepared. I think I can testify that they are.

Q. I will ask you if you also prepared the profit and loss statements for the retail and wholesale branches of the business for the month of September 1942 for use at the same time? A. I believe so.

Q. And are these papers the papers that you prepared? A. That is right.

Mr. McCall: I will ask that these be made exhibits to the witness' testimony, your Honor. [108]

Mr. Mellinkoff: Are the figures for September included in this statement?

The Witness: Yes, they are included.

(Testimony of William E. Asimow)

The Court: Any objection to their admission in evidence?

Mr. Mellinkoff: No, your Honor.

The Court: All right, they will be marked.

(The documents referred to were marked as Petitioner's Exhibit 1, and were received in evidence.)

The Court: Call your next witness.

Mr. Mellinkoff: Mr. Max Kaufman.

MAX KAUFMAN,

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Max Kaufman.

Direct Examination

By Mr. Mellinkoff:

Q. Mr. Kaufman, will you state to the court how it came about before the war that you entered into this percentage arrangement with Gimpelson?

A. I can explain exactly. At that time when I entered in with Gimpelson.

The Court: You will have to speak up.

A. At the time when I was giving Gimpelson a percent- [109] age that was just the time when Joe Arou left to the service and I was left without help and that is my nephew, Jack, he give me the needles.

(Testimony of Max Kaufman)

Q. What?

The Court: What?

A. He give me the needles. He give me a certain thing. He wasn't satisfied and he was raising—talking fresh and different ways and I was trying to satisfy him because at that time I had a market on Fairfax and I was trying to hold to that market, because Dr. Nelson from the Health Department—we was knowing each other for a long time, maybe for 25 years. He said, "Kaufman, you had better get out of this Temple Street from that place because there are rats. I am going to condemn it."

I am just holding down, you know, because it is hard to keep clean. The cooler over there was very good so I thought I will have more time to spare on Fairfax because it is a new market and a great big cooler to do the wholesaling there in the future and Jack should get a little more money here for temporary.

The Court: What did you tell him? What was your agreement with him?

The Witness: That is what I told him. I didn't give him any terms. I didn't write anything with him. I just wanted to make him happy and I promised— [110]

The Court: Did you tell him if he had not gone into the service he would have continued there?

The Witness: Well, he could continue. He could continue even in a week or two weeks because I didn't make any agreement with him at all. I just give it to him that time because I wanted to have more of his time—more time he should put into the business. He should take care of that business. I should be able to go down to that market.

(Testimony of Max Kaufman)

Q. By Mr. Mellinkoff: Now, Mr. Kaufman, after Gimpelson left for the service did you hire anyone to take his place?

A. That is right. Harry Priester.

Q. Do you still own the Fairfax market?

A. Fairfax market? I don't. I had to give up the Fairfax market when the rationing came in with the points and they were selling the points and the meats.

Q. Just a moment, Mr. Kaufman. When was it you gave up the Fairfax market?

A. I think about three and a half years.

Q. About three and a half years ago? A. Yes.

Q. And since that time have you devoted all your time to the business on Temple Street?

A. Temple Street.

Q. Now, Mr. Kaufman, when was your property condemned [111] on Temple Street?

The Court: That was stated this morning. I don't care when it was condemned. I am interested in when it was vacated. That is the only thing, it seems to me, that is material.

Q. By Mr. Mellinkoff: Mr. Kaufman, when did you move your wholesale business from 925 Temple over to Fremont? A. Well, we moved it in three months.

Q. What about the cooler?

A. We were using the cooler—using the cooler a long time.

Q. How long? A. As soon as got ready.

The Court: That doesn't mean anything. When was it?

The Witness: About nine months.



(Testimony of Max Kaufman)

Q. By Mr. Mellinkoff: Mr. Kaufman, how did it happen that your brothers put money into your business?

A. Well, the two brothers? Put money into the business?

Q. Yes.

A. When they condemned my real estate the State bought it for a highway and, well, they didn't give me very much money for it and I have an enlargement of my heart and I am over 60. I am way beyond 60.

The Court: How old are you? [112]

The Witness: I am 62.

The Court: You are not old.

The Witness: And my son is a medical man and he was giving me instructions—I shouldn't be active in business and the fact, you know, I have got medicine from every doctor what he send me to—to Dr. Goldberg and Dr. Ferris.

Q. By Mr. Mellinkoff: That is all right, Mr. Kaufman.

A. And he didn't want me to become active in the business so I was figuring at that time when the State got the real estate I wanted to sell my trucks and make a little money whatever I can and get out of it altogether.

After my younger brother Joe came and Morris was in the business I used to be in business with Morris—

The Court: Don't go into all the details. Just tell what happened.

The Witness: So Joe propositioned me. He is going to invest money to build a new place, a sanitary place, and Morris went in with it, so we made between ourselves an agreement and they were satisfied with my leadership,

(Testimony of Max Kaufman)

not to work too hard. We should continue in this business and I am very happy they were.

Q. By Mr. Mellinkoff: All right. Now, Mr. Kaufman—

The Court: Then, as I understand it, you were figuring on quitting business until your brothers wanted you to continue the business? [113]

The Witness: I would, yes, if they won't—if they won't start into this business with me I would have sold it all out. I couldn't run it any longer.

Q. By Mr. Mellinkoff: Now, Mr. Kaufman, when Gimpelson came back from the Army do you recall what if any conversation you had when he first started back to work for you?

A. When Gimpelson came back I just opened my arms like a father. I explained to him every bit of it. I put a lot of work in Gimpelson because he never made a living, you know.

Q. Now don't go into that.

A. Excuse me. I don't go into it. I was trying to—he should remain in this business. I explained him. I said, "Jack, the state got the real estate. In fact, I don't have to tell you. You are the one who wanted the coolers from me."

Q. Mr. Kaufman, just tell the court what conversation you had with Jack when he came back.

A. I said, "Jack, I don't own this any more. It is a corporation. Probably the corporation will be effected maybe in a couple of weeks." I didn't know how long it will take. And I asked my brother Morris, he is right there, how much should I—what kind of salary I should put on for Jack because he didn't have the job what we

(Testimony of Max Kaufman)

had before and the meat line was—we couldn't get meat. It was hard to [114] get. It was rationing. So we just got that much. So Morris said, "He is not a butcher. He can be a handy boy. He is a good boy when he wants to be and \$40.00 is the highest we can go."

So I took in Jack. I said, "Jack, ~~they~~ are going to allow you only \$40.00 from the business—the business belongs already to the corporation." My brother—we started in before January yet this is in December. "I will give you \$25.00 from my own pocket. I want you to be satisfied and then we will build up the new plant. We will probably be able to give you a job that will fit you better in it," and with the same proposition I came to Mr. Mellinkoff.

The Court: Did you give him the \$25.00 a week?

The Witness: I did every week.

The Court: Cash or check?

The Witness: No, cash from my own pocket. I kept on giving him and today he object to that. That hurt me very much.

Q. By Mr. Mellinkoff: All right. Now, Mr. Kaufman, when you explained all this to Mr. Gimpelson, to Jack, what did he say?

A. The first couple of months he said—well, let me say one thing more yet.

Q. Just a moment. What did he say? [115]

A. When he first came back to the business there—

Q. And you told him how much you were going to pay him and so forth. What did he say?

A. He was satisfied for two months. On the third month he started to fight with my brothers.

(Testimony of Max Kaufman)

Q. What do you mean by the third month? In March or April?

A. It was in March starting fighting with Morris. He said if he wouldn't be my brother he will stick a knife in him. He is pretty rough because he punched a doctor once on Ninth Street. I wanted to make a man out of him. Excuse me. I said to him, "Jack, my brother Morris he is a well known man. He is a high-class man. He has been in business for years. He can treat you like a son. Why do that?"

Q. By Mr. Mellinkoff: Now, Mr. Kaufman, after this difficulty arose in the business what took place then between you and Gimpelson?

A. I don't get you.

Q. After these difficulties began arising in March or April then what happened?

A. Then it was happened. He quit once. He quit. He wants to quit. In fact, he wanted to quit two weeks before and I hold him back. I really meant to hold him in my business. [116]

Q. Now, just a moment, Mr. Kaufman. Do you recall when you gave him this \$200.00?

A. When I gave him the \$200.00 that time I wanted really to have him out of there because he would have killed my brother, maybe.

Q. Well, then, he went away for a while, is that right?

A. He did, yes.

Q. Then when he came back after you had paid him that \$200.00 and he went away for a while and then he came back, then did he come in to see you?

A. He did.

(Testimony of Max Kaufman)

Q. And what conversation took place at that time?

A. Not so good.

Q. Well, tell the judge what happened.

A. He scared me with the OPA—that is my brother not making out the bills good and all.

Q. Did he say that he knew people down at the OPA?

The Court: I don't care about that, counsel. That is trivial.

The Witness: We don't want to go too far.

Q. By Mr. Mellinkoff: Well, what finally happened there?

A. What finally happened? I said to him—he said, "It won't cost me anything to sue you. I got plenty of [117] lawyers. Wouldn't cost me a dime. And it will cost you money. I will give you plenty of trouble," and he sure give me trouble all right. So I said to him, "Well, go ahead. This country is still a democratic country. Go ahead and do whatever you want."

I know Jack very well. I know him because I was trying to make a good boy out of him. He will never work straight even by the Government.

Q. By Mr. Mellinkoff: Wait a minute.

A. I have got a letter here I would like the judge to read. The reason why I don't lose that letter—

Q. What is that letter?

A. That was the business he was in when he was in the Government.

The Court: I am not interested in that.

Mr. Mellinkoff: I don't think the judge would want to see that.

The Court: Proceed, counsel.

Mr. Mellinkoff: That is all, your Honor.

(Testimony of Max Kaufman)

The Court: Just a moment. He has some questions he wants to ask you.

Cross Examination

By Mr. McCall:

Q. What did you say about you were afraid Jack would knife Morris? [118] A. That is right.

Q. And you said that he was—

A. He came in the office and he said, "If it wouldn't be your brother I kill him. I stick a knife in him."

Q. And what happened that made you think he was talking seriously?

A. Well, I know Jack when he was a kid. He was the worst kid from the bunch. He got brothers. He was the worst one. In fact, I bring him over here to make something out of him. He would be all right if he wouldn't have the protection of the lawyers, of you people. He would have worked all right and he would never ask for anything.

Q. Never mind that. Where was it he was ever in trouble that indicated to you—

The Court: I don't care anything about that, counsel.

Q. By Mr. McCall: Isn't it a fact that this man taught high school, public school?

A. He taught high school?

Q. Yes. A. When?

The Court: I am not interested in that, counsel. Let us get down to the issues.

Mr. McCall: If your Honor please—

The Court: Proceed.

Mr. McCall: He is attacking this man's veracity.  
[119]

(Testimony of Max Kaufman)

The Court: He said he threatened his brother with a knife. Suppose he did teach in a high school or didn't teach in a high school? That is not a material issue for impeachment purposes.

Q. By Mr. McCall: Now, you rented the quarters where the store was located, didn't you?

A. I don't get you.

Q. You rented the quarters where both of these stores were located, didn't you?

A. You mean I used to rent them? They were rented?

Q. Yes. You don't own that ground, do you, or never did?

A. No, that is rented; yes, that is rented.

Q. So that the rent was a part of the business operation here, is that right?

A. It is a part of the business, yes.

Q. And all you had to do to continue in this business was to go and rent another place, wasn't it?

A. Well, you see this business—I will explain it, this wholesale business. If you can't drive in with a truck and if you can't drive out with a truck, delivery, then the store wasn't any good. I had my own property there but I used to have a drive-in there and I used to have a storage place before I started in to build. We put up papers and all and we deliver—Cudahy brings in the meat to the rear [120] and we deliver it inside on a rail. You see that wholesale goes on a rail and then when we send our trucks out we send them out from the rear, too, you see. We have got to have a rear platform. We have to have a place to unload it, so the main thing was my piece of real estate because the store alone don't do any good.

(Testimony of Max Kaufman)

Q. You mean you had some vacant property next door?      A. That is right.

Q. Close to it?      A. Right next to it.

Q. That was used as a driveway?      A. Yes.

The Court: What do we care about that?

Q. By Mr. McCall: Now, what was done with this money that your brothers put in? Was it to buy another piece of property?

The Court: Counsel, is it your contention he should have gone out and rented another building to furnish a job for this man instead of building a new building?

Mr. McCall: No, your Honor. I want the facts.

The Court: I understand the facts. It has been pretty well explained that there was additional money put into the company so they could put up a building to house the business.

Q. By Mr. McCall: Did Jack Gimpelson buy any meat for you? [121]

A. They all bought for me meats. Here is a gentleman here—

The Court: Answer the question.

A. He just bought small stuff—offal.

Q. By Mr. McCall: Did you consider him a good meat buyer?

The Court: I don't care whether he was a good meat buyer or not.

Q. By Mr. McCall: I will ask you if he didn't have complete charge of all the buying for three years at that store?

A. My dear, we ain't buying any meat for the last six years because the packing house send you the beef. The



(Testimony of Max Kaufman)

beef is pretty scarce and that is the only time I have been going for beef when there is a shortage. We can't get it.

Q. Suppose you answer the question, please, sir?

A. Yes, sir.

Q. Was he in complete charge of all the buying for three years at that store? A. No.

Q. He was not? A. No.

Q. Did you ever make a statement to that effect?

A. If I ever made a statement to that effect?

Q. To that effect, yes. [122]

A. Here is a girl that—she made it that way.

Mr. Mellinkoff: Answer the question, Mr. Kaufman.

The Witness: No.

Q. By Mr. McCall: You did not? Do you recognize this letter that I hand you now?

A. Well, if this is Elinor's or mine I couldn't tell you. She writes pretty near like I do but Jack sent a letter.

Q. First, did you write that letter?

A. I didn't write that letter. That signature looks like—it is my signature.

Q. You think you signed the letter, though?

A. It is a letter to—

Mr. McCall: I would like the lady to take a look at the letter.

Mr. Mellinkoff: You can call her as a witness in just a moment, may it please the court.

The Court: Counsel, just a moment. I don't care whether this witness bought all the meats or not. The petitioner had a job there at the time he went into the service. Now, whether or not he was entitled to that job back is the real issue here.

(Testimony of Max Kaufman)

Mr. McCall: Your Honor, that is true, but it is also true as to the credence your Honor should put in the testimony of this witness. [123]

The Court: Now, wait a minute, counsel. Whenever you get into a family row, which this apparently is, there is not too much truth coming from the lips of any of the parties. It is at least prejudiced. And in the second place, I assume that is a letter that was written to the Draft Board, is it not?

Mr. McCall: To whom it may concern. It was sent to be used in connection with the Army.

The Court: For deferment?

Mr. McCall: No. It was not for deferment. It was after Mr. Gimpelson was in the Army.

The Court: To help him in the Army?

The Witness: That is right.

Q. By Mr. McCall: Did you sign that?

The Court: We do not take too seriously letters of recommendation, counsel. At least I never did.

Mr. McCall: Well, it recites a fact, if your Honor please, which is as follows—

The Court: Introduce it in evidence. I can read.

Mr. Mellinkoff: We object to it.

The Court: It will be admitted. It is immaterial as far as I am concerned but it will be admitted. It will probably make Mr. McCall happy and then we can go to something else.

(The document referred to was marked as Petitioner's Exhibit 2, and was received in evidence.) [124]

(Testimony of Max Kaufman)

Q. By Mr. McCall: Now, Mr. Kaufman, did you give a statement of your financial affairs to an interviewer for Dun & Bradstreet for the purpose of making a credit report in March of 1946?

Mr. Mellinkoff: I object to this unless there is some foundation laid. I don't see the materiality of it.

Mr. McCall: It is cross examination.

The Court: What is the materiality of it?

Mr. McCall: This is cross examination. I am trying to get to a point.

The Court: I want to know how it is material.

Mr. McCall: I want to know if he was not the sole owner of the business on March 30th, 1946, from his own representation for credit.

The Court: All right.

Q. By Mr. McCall: Were you interviewed on March 30th, 1946 by an interviewer for Dun & Bradstreet, to whom you stated as follows: You confirmed the filing of corporation articles but stated that as yet no application had been made for the issuance of stock and that you remained the sole owner of the business? A. No.

Q. Did you make that statement on March 30th, 1946? A. March 30th, 1946?

Q. To Mr.— [125]

Mr. Mellinkoff: Richardson.

Q. By Mr. McCall: Yes, Mr. Richardson, for the Dun & Bradstreet Company? A. No, I didn't.

Q. You did not?

A. No. Maybe anybody else did but I didn't.

Q. And on April 1st, I will ask you if you pro-rated the wages of the people who worked at the place of business?

(Testimony of Max Kaufman)

Mr. Mellinkoff: I don't understand your question, Mr. McCall, and I don't think the witness does.

Q. By Mr. McCall: On April 1st, 1946 did you pro-rate from that time on the wages of the people, paying them from your own bank account as the Chicago Hotel, Restaurant and Supply Company up until that date, and in your capacity of signing checks, sign checks in your capacity as president for the corporation thereafter?

The Court: I guess there is no question about that, is there? On April 1st there was a change-over in the method of carrying on the business.

The accountant said he set up the books as of April 1st and from then on they had a corporation bank account and that this witness then drew checks on his own personal account instead of drawing them from the business.

Q. By Mr. McCall: Is that the way it was?

A. Something, sir. I don't know. [126]

Mr. Mellinkoff: May it please the court, the witness has difficulty understanding these questions. I think that has already been testified to, anyway, and the witness is just confused by the language that is used here.

The Court: Up until April 1st you carried on your business and drew checks yourself, didn't you?

The Witness: Up to April.

The Court: Under the name of your company, the fictitious name of Chicago Restaurant and Supply Company?

The Witness: That is right.

The Court: Then after you changed over into a corporation you changed your method?

(Testimony of Max Kaufman)

The Witness: Well, yes, we changed over to the corporation.

The Court: And then you signed as president of the corporation?

The Witness: I sign as president of the corporation.

The Court: But before that you signed as the owner?

The Witness: I signed it as—well, as the owner, that is right.

The Court: Did anybody else sign checks besides you?

The Witness: They don't sign any checks right now even today except me.

Mr. Mellinkoff: But you were the one who was signing the checks, Mr. Kaufman? [127]

The Witness: That is right; yes, that is right.

Mr. McCall: That is all, your Honor.

The Court: Take a five-minute recess at this time.

(Short recess.)

The Court: How much longer is it going to take, Mr. Mellinkoff? How many more witnesses do you have?

Mr. Mellinkoff: I don't think I will put on all the witnesses I have brought here. I will just call one or two more witnesses. I have additional witnesses but to save time I would as soon not call them unless your Honor desires their testimony. Morris Kaufman is here and Joseph Kaufman is here and their testimony would simply be corroborative of Max Kaufman's testimony.

Insofar as that letter of recommendation is concerned the bookkeeper, who wrote that letter, is here, and can testify that it was written at his request if that is desired.

As far as the Dun & Bradstreet statement is concerned it is a legal conclusion that Mr. Kaufman is not familiar with.

The Court: I would like to hear from one of the brothers that entered into this business.

Mr. Mellinkoff: Very well, sir. Joseph Kaufman, will you take the stand? [128]

JOSEPH KAUFMAN,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Joseph Kaufman.

The Court: May I be permitted to ask him a few questions?

Mr. Mellinkoff: Certainly, your Honor.

The Court: When did you first put money into this business?

The Witness: 1944, your Honor.

The Court: 1944?

The Witness: 1945, your Honor.

The Court: 1945?

The Witness: Yes, sir.

The Court: Were you working there at the time?

The Witness: No, sir. I came here for a visit from Chicago.

The Court: You came here for a visit?

The Witness: From Chicago.

The Court: And how much did you put in at that time?

(Testimony of Joseph Kaufman)

The Witness: At that time I gave a deposit on a piece of ground, in escrow \$2,000 and more money followed immediately for my partnership in this business. [129]

The Court: What was your agreement? Under what circumstances did you make a deposit upon this ground? What agreement did you have with your brother Max?

The Witness: Your Honor, when I came here I found out that my brother has to go away from the business, that his place is going to be taken away by the State. He was downhearted a little bit after being in business so long in one place, so I tried to cheer him up. I said, "Nothing is lost yet. We don't know. And I might go in with you. We will see what we can do." And I talked it over with my middle brother, Morris Kaufman, and then I spoke to Max again and I give him a proposition.

The Court: What proposition did you give him?

The Witness: I said, "Max, what is the use of being downhearted and being sick about it? We will go in. We will build up a new business, a real good, going business, and we will be proud of it and I will make you proud of the business that you are in right now," and I am trying to do that, your Honor.

The Court: Well, did you have any understanding at that time as to the shares? Did you have an understanding with reference to the 40, 30 and 30 basis?

The Witness: Not that my brother asked for it, but his accountant asked for 51 per cent.

The Court: His accountant did? [130]

The Witness: Yes. You know a matter of routine—just conversation. So I explained to him I wouldn't give up a business in Chicago and sell out and come here to my brothers and feel that I only got a minor part in the

(Testimony of Joseph Kaufman)

business. I said, "I think I am capable of taking an active part and it wouldn't be fair to all of us but it would be fair," being that he is in the business, "you should go in 30, 30 and 40."

The Court: When did you agree on that?

The Witness: That was in 1945, your Honor.

The Court: When did you decide to incorporate?

The Witness: Right then and there when we went out to buy a piece of ground. I came in when I made up my mind and I set my mind to business immediately and we went out to look up the piece of ground and I gave a personal check, deposit of \$2,000 immediately.

The Court: We don't care about the checks unless there is some question about it.

Mr. McCall: That was December 5th, your Honor, payable to escrow.

Mr. Mellinkoff: December 6th was the date of the check, 1945.

Mr. McCall: Payable to the Los Angeles Escrow.

Mr. Mellinkoff: That is right.

The Court: After that who managed the business?  
[131]

The Witness: After that I went back to Chicago to liquidate my own business.

The Court: Who was managing the business when you went away?

The Witness: Max Kaufman and Morris Kaufman were there to manage the business when I went away.

The Court: How much money did you put in the business?

The Witness: Well, off-hand I couldn't tell you, but a considerable sum.



(Testimony of Joseph Kaufman)

The Court: You heard the statement of the accountant here.

The Witness: Yes, sir; he was quite right.

The Court: Was that correct?

The Witness: Yes, that is a correct statement. I put in additional money as we needed it as we go along, as much as we need.

The Court: Do you know how much your brother put in?

The Witness: Well, fortunately he could put in his assets—that was his assets in the business.

The Court: I mean Morris Kaufman?

The Witness: Well, honestly, your Honor, I advanced Morris Kaufman a little bit of money to go into business.

The Court: And you made that arrangement in the latter part of March, 1945?

The Witness: Yes. I had only the welfare of my [132] brothers in my mind.

The Court: That is when you made the arrangement?

The Witness: Yes, that is the time we made our arrangement.

The Court: And you have been interested in the business ever since?

The Witness: Yes, sir.

The Court: That is all the questions I care to hear from you.

Mr. Mellinkoff: I just want to ask one additional thing.

(Testimony of Joseph Kaufman)

Direct Examination

By Mr. Mellinkoff:

Q. Who actually built this new building?

A. I did, sir.

Mr. Mellinkoff: Your witness.

Cross Examination

By Mr. McCall:

Q. When did you come back from Chicago?

A. I came back February 7th. Why I know it is February 7th is because my son wanted to go into the Army from Los Angeles instead of going in from Chicago and he had just graduated from school. That is why I know it is the 7th when we came in at that time.

Q. Then you finally got all the business straightened [133] out by April 1st to take over the store?

A. The business was straightened out before I left. I would not leave if the business was not finished. The business was straightened out when I left. I will come back when I liquidate my business in Chicago and I come back. As far as money was concerned I told my brothers not to worry about it, I will finance it all the way through as much as we need for this kind of business and that he should be proud of what I had in mind about another business, manufacturing sausage.

Q. That was an additional type of business?

A. Additional to this because this is not big enough.

Q. And that was what the new building was built for?

A. This building was built for sausage business. Unfortunately we couldn't get no permit to build the factory.

(Testimony of Joseph Kaufman)

Q. The building that was built?

A. The building that was built to move on Mr. Kaufman's first piece of property that he had on the premises, we moved these pieces over. They were old property. We moved them over and we made something to look at.

Q. Is that the piece of property over there where the building was put up—was that to have been the place where the sausage business was to be put?

A. Well, over there? No, it can't be used for [134] sausage over there.

Q. Can't be?

A. But there is plenty of ground to improve it and make more if we get—if material will be available but it is not.

Q. How much money had been put in—actual money had you put in up to—prior to the time that you came back on February 7th?

A. Honestly, offhand I couldn't tell you, but I know I put in one time \$15,000 and—

Q. Was that before or after you came back from Chicago?

A. The \$15,000 was after I came back from Chicago, yes, but \$6,000 I put in before I even be here—before I came in the second time.

Q. In other words, you put up \$4,000 in addition to the \$2,000?

A. Yes, to make things go because I know when I come back I have to do something.

Q. Now, the sausage business—what is the holdup on getting into that now?

A. You can't get material to build and we couldn't get no priority for it.

(Testimony of Joseph Kaufman)

Mr. Mellinkoff: Are you through with the witness, Mr. McCall? [135]

Mr. McCall: Yes.

The Court: That is all. I would like to hear from the other brother.

Mr. Mellinkoff: Mr. Morris Kaufman, will you take the stand?

MORRIS KAUFMAN,

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Morris Kaufman.

The Court: When did you become interested in this business? When did you first have a financial interest in it?

The Witness: The last time it was in December 1941.

The Court: When did you put money into the business?

The Witness: In the corporation?

The Court: Yes.

The Witness: The same time as my brother Joe has put in his \$2,000 I put in my \$5,000.

The Court: You put in \$5,000 at that time?

The Witness: Yes, sir.

The Court: Did you put the \$5,000 in the business at that time?

The Witness: In the business and property all the way through. [136]

The Court: At that time did you three men have an understanding that you were to have 30 per cent?

(Testimony of Morris Kaufman)

The Witness: Yes, sir.

The Court: And you were managing the business at that time?

The Witness: Yes, sir.

The Court: In the meantime they disposed of the Fairfax business?

The Witness: That is right.

The Court: So you only had the one place of business?

The Witness: That is right.

The Court: That is all I am interested in. Just a moment. Did you ever have any trouble with Gimpelson?

The Witness: Well, as a matter of fact, I very much like Mr. Gimpelson but he didn't like me. I don't believe he can furnish a reason why.

The Court: You never had any trouble with him?

The Witness: No, sir.

The Court: That is all.

### Cross Examination

By Mr. McCall:

Q. Did Mr. Gimpelson ever offend you in any way?

A. What?

Q. Was Mr. Gimpelson offensive to you in any way at any time? [137]

A. No, sir; not in words. We never spoken to one another. Only thing he aggravated me by cutting up the meat wrong and that is the truth.

Q. When was that?

A. Oh, the time when he got back from service. I was more than glad to have him. We could have re-

(Testimony of Morris Kaufman)

maintained friends until today if he wanted to. That was up to him.

Q. What kind of wrong cutting did he do? What was it? A. There are lots of ways—

The Court: I don't care about that.

Mr. McCall: I believe that is all.

The Court: This witness is excused?

Mr. Mellinkoff: Yes, your Honor. That is all.

The Court: Have you any argument you wish to present?

Mr. McCall: I would like to call two witnesses, your Honor.

The Court: All right.

Mr. McCall: Mr. Richardson.

WALTER CHARLES RICHARDSON,

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified in rebuttal as follows:

The Clerk: What is your full name?

The Witness: Walter Charles Richardson. [138]

Direct Examination

By Mr. McCall:

Q. Mr. Richardson, where are you employed now?

A. At the present time I am employed as right-of-way man by the Southern California Gas Company.

Q. On March 30th, 1946 were you employed by Dun & Bradstreet? A. I was.

Q. Are they people who get up credit reports on businesses? A. That is right.

(Testimony of Walter Charles Richardson)

Q. Did you on that date interview Mr. Max Kaufman with respect to his business?      A. Yes, I did.

Q. I will hand you a paper and ask you if you will state—

Mr. Mellinkoff: I would like to see it.

Mr. McCall: All right.

The Witness: Yes, this is my number up here. I wrote this report.

Q. By Mr. McCall: Did you make the report to the company of an interview that you had with him on that day?      A. Yes, I did.

Q. I will ask you if that is, what you are looking at there, is the report you made? [139]      A. Yes.

Mr. Mellinkoff: May I read this for just a moment?

The Court: There is only one question. Did Mr. Kaufman tell you that he was the sole owner of that business on that date?

The Witness: Yes, he did, sir.

The Court: Did he tell you it was incorporated?

The Witness: No, he didn't tell me it was incorporated. He said there had been plans but no issuance of stock at the present time.

The Court: He said there were plans?

The Witness: Yes, sir.

The Court: Did he tell you who the other parties were that were interested?

The Witness: Yes, sir. He told me that his two brothers were interested, were going to be officers in the corporation.

The Court: Did he tell you that they had put some money in?

(Testimony of Walter Charles Richardson)

The Witness: No, he didn't tell me they had put money in.

Q. By Mr. McCall: Did he tell you this specifically, that he confirmed the filing of the corporation articles but stated as yet no application had been made for issuance of stock and that he remained the sole owner of the business? [140]

A. That is right. May I clarify one thing, your Honor? I went out to interview him because a questionnaire had been sent in to the office asking if this business had incorporated. It was a commercial query.

The Court: Counsel, what was the date of the issuance of the stock?

Mr. Mellinkoff: I could not tell you offhand.

The Court: You had to obtain a permit?

Mr. Mellinkoff: Yes, but I could not say offhand. I know it was decided to issue the stock a long time before it was actually issued. I could not give you those exact dates.

Mr. McCall: I subpoenaed the stock book of the corporation but I haven't seen it here today. I served the subpoena on Mr. Max Kaufman.

Mr. Mellinkoff: May I ask the witness a question?

The Court: Yes.

Mr. Mellinkoff: Mr. Kaufman, you say, said that he was the sole owner of the business. Did he use those words or did you use those words?

The Witness: The words—I asked Mr. Kaufman, I said, "Well, Mr. Kaufman, has this business been incor-



(Testimony of Walter Charles Richardson)

porated as of yet?" And he said, "No, it hasn't," and I said then, "You are still the sole owner of the business?" And he said, "Yes, I am." [141]

Mr. Mellinkoff: Did you ask him whether or not his brothers had any money in the business?

The Witness: No, I did not ask him that.

Mr. Mellinkoff: That is all.

Mr. McCall: That is all. Mr. Corral.

EDWARD CORRAL,

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified in rebuttal as follows:

The Clerk: State your full name.

The Witness: Edward Corral.

Direct Examination

By Mr. McCall:

Q. Mr. Corral, were you employed by Mr. Max Kaufman in the meat business out there on Temple, West Temple Street in 1941? A. I was.

Q. What was your position?

The Court: Counsel, I do not care what his specific duties were at that time.

Mr. McCall: Well, I had these men here, your Honor—

The Court: That does not mean I have to listen to them.

Mr. McCall: That is correct. That is all he was going to testify to. [142]

The Court: That is all.

Mr. McCall: We rest, your Honor.

The Court: I will listen to any argument you wish to present. You resented before when I did not permit you to make a speech, so I am going to give you that opportunity now.

Mr. McCall: If your Honor please, this is a case of a veteran who came back from the war seeking his former position.

I do not believe there is enough dispute about the facts in this case to make any great big difference. Of course there have been some issues presented that the veteran was not general manager and this was a temporary arrangement, but the facts do not support that.

It is very clear this man was the manager of that business before he went to war; that he had been there as manager for some time and that this profit-sharing arrangement was entered into when the business got on its feet and was ready to make some money for Mr. Kaufman.

The young man was drafted and taken away from that job and went to war.

Now, it is said that the Fairfax Avenue store had something to do with the matter but I don't believe it did because the testimony is that Mr. Max Kaufman was around this Temple Street store quite regularly. He was the [143] owner. He was around and generally supervised everything because he owned it. But Mr. Gimpelson here was the manager of the Temple Street business and received a 50 per cent cut of the profits of the wholesale business and 25 per cent of the retail business.

It was perfectly satisfactory with everybody that that be the arrangement at that time. He went to war and he came back. There is nothing wrong with the man at all. He is a perfectly good man. He must have been

given some pretty fair investigation to be passed and be employed by the OPA now.

He knew the business. You could tell that by the questions that were asked of him.

When he came back his uncle had been in conference with some of his brothers there about putting some money in this business and incorporating. They were going to do that.

The arrangement had already been made they testified, although it had not been carried out. Steps had been taken to put in escrow a piece of property to be built by the corporation when they got the property cleared. In the meantime this store was continued to be operated there.

The veteran came back just about the time that the deal was made looking to the acquisition of this property.

Now, if your Honor recalls the testimony of the brother Joseph, this arrangement that these three brothers [144] had was not simply continued this business and provide a home for it. They were looking to go into the sausage manufacturing business on a rather large scale. They were going to expand the business, so that that was involved in this matter in addition to simply the formation of the corporation.

The brothers all knew of the relationship this young man had to the store before. Morris had been there and had been working under this man. He came back and he applied for his job.

Now, he told, and I believe your Honor put credence in what he said, about his conversation there with Max Kaufman at the time he went to work or during December there, at the time he went to work in January of 1946.

He wanted to get along with Morris and when Joe got back from Chicago to get everything straightened out.

So he went to work and apparently he didn't cut meat right, according to Morris' way of thinking, so for some reason or other, which I don't know, some sort of little dispute got up there and the man was not put back to doing the same thing he had done before he was put back to a service job. He was just working there while these men were getting adjusted so that he would be given an opportunity to go ahead with the business.

Now, ultimately this piece of property for the expansion of this business was acquired and about nine months [145] ago they began to put some refrigeration and stuff over there and about three months ago they finally got the wholesale part of this business over to that location, but even today and right now the property where this business was located is still there and being operated by these same people, by Max Kaufman.

Max Kaufman is the president of the corporation. This corporation did not take over any portion of this business until April 1st, 1946. The articles of incorporation were filed January 21st, 1946 and there is a date there showing stock, when it was filed sometime in February.

Mr. Mellinkoff: January 24th, I believe.

Mr. McCall: And when was it filed in Los Angeles?

Mr. Mellinkoff: January 24th.

The Court: Let us not argue about that.

Mr. McCall: Even then there was no transfer of this business. In order to get this business that was here into that corporation there has to be a transfer. It just don't automatically hop over there. That was done on the date of April 1st, 1946.

Now, until that time it is perfectly obvious what the law was—what Mr. Richardson said that Mr. Kaufman told him on March 30th that he was the sole owner of

this business and he still had the business. He was obligated, perhaps, to make a transfer in the future when all these things were to [146] be done but he, up to that point, was the sole and complete owner of that business.

The reason why he did not want to put this young man back in the place of manager, as far as I can see, was that Morris was there and had put up some money and was going in the business with him and didn't want that blocked off. He wanted to go ahead and then after "we all get there I will take care of Jackie and give him a substantial part and job in this sausage manufacturing outfit and in the wholesale business." Now, that was it. Well, it then developed and here was the turning point, after they had got the business incorporated and got it going the young man wanted to be taken care of.

\$40.00 a week is no money. He has a family to support. He had to have some more money than that. "Now is the time for me to get a job if I am going to have a job." "Well, Jackie, all the job you can get is if you go out and get some money and put in this corporation we will give you a job." This is after he came back. "If you don't buy some stock in this company you won't be in it." That is not disputed.

Then there is just nothing to do about it. "We can't manage Morris. We can't do anything else about it."

Those are the facts with which your Honor has to deal in this case. And I think they are material facts. [147]

I don't say that the Selective Service Act tied up all the property in the country so there couldn't be a re-arrangement or transfer of business, but I do say that it did give a man a right to his job when he came back—the same job he had unless it was unreasonable and impossible for the employer to put him in that job—unless

circumstances had so changed it would be unreasonable or impossible.

Now, when this man applied for his job it was neither unreasonable nor impossible to put him back in as the manager of that business, pending at any rate the formation of this corporation and that still was in the embryo state. It had not been carried through.

The Court: Let me ask a question. When he came back and re-entered the employ of this company he was apparently willing to go along until they had their blow-up in April when he received the \$200.00.

Now, assuming that a returned veteran accepts a position when he is entitled to a position of like seniority and pay, if he accepts a position of less pay and less seniority and continues under that can he at the end of the year sue for the difference under your construction of the statute?

Mr. McCall: I think, if your Honor please, that altogether depends upon what is right.

The Court: But up until they had their difficulty in April had he waived any of his rights? My position is that [148] he was entitled to his job for a year when he came back. However, when he came back he was told conditions were different. If he was not told that he could at least see it. But they did have a job for him and they gave him \$40.00 a week. He continued in that position at \$40.00 a week until the last two weeks he received \$55.00 a week and then there was some trouble came up and he took his vacation. He was given \$200.00 to go on a vacation.

Up until that time hadn't he, at least during that period, waived the benefits of the Act?

Mr. McCall: I don't think he had, your Honor, for this reason. He was relying upon a future course of conduct to take care of him and that was breached when they told him that in order for them to take care of it he had to get some money and put it in there.

They didn't carry through with him. They put another condition on it which barred him from enjoying the benefits of any portion of the Selective Service Act when they demanded that he acquire stock in this company as a condition to remaining there with a fair job.

In other words, this entire course of conduct was induced by the promise of Max Kaufman to take care of him down here when this company was formed. Then when Max Kaufman demanded that he put up money and buy stock in the company that was an additional thing that takes away any [149] consideration of consent for the period prior to that time.

Now, the man was legally entitled to this right. He received nothing of value greater than he was entitled to at any time. There was no waiver there. He simply went to work under the inducement and expectation when this corporation was put up he would be taken care of and that was satisfactory with him.

Now, when it was required that he buy stock in order to keep his job that is something else again.

Now, I don't see, your Honor, how it could be said that this man has waived any of his re-employment rights for any portion of the period during which he was there because they didn't carry out their part of the thing. They breached it in the end. Max Kaufman breached it in April, in the latter part of April 1946.

Now, passing on from that, your Honor, and getting into whether or not this corporation is obligated to this

veteran, it has been said in the Fishgold case that no contract between an employer and other men, including labor unions, could detract from the veteran's re-employment rights. And there are a couple of cases on their way to the Supreme Court now involving the question of whether or not a union contract which impairs the position which the veteran formerly held, which union contract was entered into after the beginning of his military service, the change being detri- [150] mental to him, is binding upon him when he comes back. That is in the Trailmobile case which was argued before the Supreme Court a few days ago.

But it seems to be settled law so far as I know under the Fishgold case, that you cannot bargain a veteran's re-employment rights away.

The Court: Are we trying a union case here?

Mr. McCall: No, but it is a contract case. All of it is contract. In one case it is a contract with five thousand employees and in another contract with a—

The Court: Counsel, there are certain conclusions I have come to. I am going to let you talk as long as you want in order to let you make your speech. You said you wanted to make a speech before and felt kind of hurt because I wouldn't let you make a speech and wave your arms, so I am going to give you this opportunity, but let us stay with this particular case.

Mr. McCall: I was referring to that solely on the basis that the veteran's re-employment rights cannot be contracted away between the employer and a third party.

It was recently held in a San Francisco District Court that where a business had been transferred to a third party and it was a bona fide sale during the absence of the veteran, that the third party was not obligated to re-



employ the veteran. That case was cited in the brief of respondents and I agree with that case. I do not think [151] the law puts a lien on the property of the employer, but that is not the case here.

In this case a veteran returned while the employer still had the business. It was within his power to re-employ the veteran and not to discharge him without cause for a year.

He did re-employ the veteran. The veteran went back into his service.

Now, when re-employment occurred a contract of re-employment occurred under the law in which the employment provision was written: That "I, Max Kaufman—" this was the implied legal effect, "I, Max Kaufman, re-hire Jack Gimpelson and will not discharge him without cause for a year and will restore him without loss of seniority" and so forth, "to the place he had before."

Now, that is the provision of the law and the law automatically enters into every contract that is effected between two individuals regulated by it, so that that was the contract.

Now, I am saying in this case, your Honor, that I doubt there is any clear answer to the question whether or not Max Kaufman could entirely dispose of that business to third parties and thereby deprive the veteran of his re-employment rights during that year without himself becoming personally liable for it. I do not concede that but I do [152] say that where the employer simply merges his interest into a succeeding corporation or a partnership or something else he is obligated to re-employ a veteran and retain him for a year—that there is a legal obligation that goes on into that succeeding entity into which he merges his business. It is just as much a part of the

obligation of that business and that employer to continue that employment on a merger as it was on the individual employer to do so.

That is the argument that I make here and that the merging of this business into a corporation which was formed for the purpose of acquiring a place to house the business and expand the same did not relieve that business nor the employer of retaining this veteran in its employ.

To the extent that there was a contract of re-employment entered into Max Kaufman was not free thereafter to simply voluntarily divest himself of all his legal obligation with impunity. I say there was a legal duty. There also was a moral duty and, as I say, there was a legal duty to see that this veteran was taken care of; a legal duty to see that he was—that in the merger his re-employment rights to work were protected for a year in order that he may get back into civilian life. That obligation rested on Max Kaufman and he could not voluntarily and for his own benefit divest himself of that obligation.

That is the problem in this case, your Honor, [153] and it is the problem that I think should be answered in favor of returning veterans.

I don't say that they have a lien on any portion of an employer's business, but the employer's freedom of contract is affected by the return of a veteran to this employer. He owes him a legal obligation to employ him and not to discharge him for a year.

If it becomes impossible for him to do so, without his own voluntary act taken for his own benefit then I say he is discharged of that liability. That is an involuntary divestiture of the obligation, but where he willingly does so for his own benefit—

The Court: Counsel, just a moment. That is an unfair statement: "He willingly did so." There is nothing here to indicate any bad faith on the part of Mr. Kaufman in disposing of his business.

Mr. McCall: I did not mean that.

The Court: And I think that is an unfair inference.

Mr. McCall: I did not mean to make such an inference, your Honor.

The Court: That is the inference that naturally follows, that he "divested himself willingly of his property."

I want to say frankly, that I have been more impressed by Mr. Kaufman than I have with the petitioner in their testimony. It carries more weight with me. [154]

Mr. McCall: I am not intending to impugn the motives of Mr. Kaufman, your Honor, into entering into this arrangement. I simply contend that as a matter of law his obligation followed into the merged enterprise and that in fairness that should be the construction and application of the re-employment provisions for the protection of men who do return from the service.

I don't think that a purchaser of a business is obligated to look and make inquiry about whether or not there are veterans there who he must continue in his employ. But the obligation should rest somewhere in the case of mergers of this kind and I think it should rest on the former employer to take care of his former employees, and I believe where the former employer still has an interest, still controls and runs the business, that he should carry that into the merged business.

The Court: I am going to take the matter under submission and if you have any points and authorities, file them within five days.

My present state of mind is to hold that the employer's position is so changed as to render re-employment unreasonable and impossible.

Now, that is my present state of mind. If you wish to submit any points and authorities you may do so.

I have given these parties an opportunity to get [155] together. They seem to want to continue to quarrel. I told you somebody would get hurt by my decision and somebody is going to get hurt. I do, however, feel there was a change, an absolute change in this business and the conditions of it.

The business, the property itself was effected and disposed of. He disposed of the Fairfax market in the meantime.

Here was a man who was getting along in years. He had to either pull out or bring in new blood. Those things necessarily transpired. They were not done intentionally for the purpose of avoiding any responsibility that he may have owed to the petitioner. I feel that conditions had so changed that for him to have done otherwise would have been unreasonable and impossible.

However, I am willing to give either side five days to submit any points and authorities they may desire to submit. Otherwise I will decide the case if they are not received within five days.

The matter will stand submitted.

(Whereupon, at 4:30 o'clock p. m., the above entitled matter was concluded.)

[Endorsed]: Filed Jun. 2, 1947. [156]

[Endorsed]: No. 11660. United States Circuit Court of Appeals for the Ninth Circuit. Jacob S. Gimpelson, Appellant, vs. Max Kaufman, doing business as the Chicago Hotel and Restaurant Supply, and Chicago Hotel, Restaurant and Meat Supply, Inc., a corporation, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed June 20, 1947.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals for  
the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11,660

JACOB S. GIMPELSON,

Appellant,

vs.

MAX KAUFMAN, dba the CHICAGO HOTEL AND  
RESTAURANT SUPPLY; and CHICAGO HOTEL,  
RESTAURANT AND MEAT SUPPLY, INC., a  
corporation,

Appellees.

APPELLANT'S STATEMENT OF POINTS ON  
WHICH HE INTENDS TO RELY ON AP-  
PEAL, AND DESIGNATION OF THE PARTS  
OF THE RECORD NECESSARY FOR THE  
CONSIDERATION THEREOF

Comes now Jacob S. Gimpelson, the appellant herein, pursuant to Rule 19(6) of the Rules of this Court, and hereby adopts the "Statement of Points on Which Appellant Intends to Rely on the Appeal," filed with the District Court Clerk on June 2, 1947, as and for his statement of the points on which he intends to rely in this Court. (See Transcript of Record, page 28.)

Appellant Gimpelson further hereby designates those parts of the record which he thinks necessary for the

consideration of the said points, and for printing, as follows:

\* \* \* \* \*

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[Endorsed]: Filed Jun. 24, 1947. Paul P. OBrien,  
Clerk.





No. 11,660.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

JACOB S. GIMPELSON,

*Appellant,*

*vs.*

MAX KAUFMAN, doing business as the CHICAGO HOTEL  
AND RESTAURANT SUPPLY; and CHICAGO HOTEL,  
RESTAURANT AND MEAT SUPPLY, INC., a corporation,  
*Appellees.*

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## BRIEF FOR APPELLANT.

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FILED

DEC 17 1947

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*Appellant,*

*vs.*

MAX KAUFMAN, doing business as the CHICAGO HOTEL  
AND RESTAURANT SUPPLY; and CHICAGO HOTEL,  
RESTAURANT AND MEAT SUPPLY, INC., a corporation,

*Appellees.*

---

**BRIEF FOR APPELLANT.**

---

**Jurisdiction.**

Appellant Jacob S. Gimpelson (sometimes herein called "the veteran") appeals to this Court from a judgment of the United States District Court of the Southern District of California dismissing his petition filed against Appellees Max Kaufman, individually, and Chicago Hotel, Restaurant & Meat Supply, Inc., a corporation, for enforcement of his reemployment rights as a veteran of the armed forces under *50 U. S. C. A. App., Secs. 308 and 357*.

Jurisdiction below was based on *50 U. S. C. A. App., Sec. 308(e)*; and of this Court on Judicial Code, Sec. 128(a)—First, *28 U. S. Code, Sec. 225(a)—First*.

### Statutes Involved.

This case involves the construction and application of the following statutes, material portions of which are abstracted or quoted in the Appendix hereto, to wit:

(1) Sections 8 and 16(b) of the Selective Training and Service Act of 1940, as amended. *50 U. S. C. A. App., Secs. 308 and 316(b)*.

(2) Section 7 of the Service Extension Act of 1941, as amended. *50 U. S. C. A. App., Sec. 357*.

(3) Sections 6, 7, 16 and 17 of the Uniform Partnership Law, as adopted in California. *California Civil Code, Secs. 2395-2462, especially Secs. 2400, 2401, 2410, 2411, and also Secs. 1427-1428*.

(4) Limited Partnership Law of California. *California Civil Code, Secs. 2477-2510, especially Secs. 2477-2478 and 2483*.

(5) California Corporation Law, especially *California Civil Code, Secs. 285-293, 308, 326-329*.

(6) California Corporate Securities Act (*Stats 1917, p. 673 et seq.*), as amended. *Deering's California General Laws (1944), Vol. 2, Act 3814, especially Secs. 2(8), 3, 16, 33*.

(7) Statute of Frauds. *Code of Civil Procedure of California, Sec. 1973a(1)*.

## STATEMENT OF THE CASE.

Appellant Gimpelson, an honorably discharged veteran of the armed forces, petitioned the District Court to require the two appellees (1) *to reemploy and restore* him to his former position as general manager of their meat market in Los Angeles, California, and (2) *to compensate him for his interim loss of wages* suffered by reason of their refusal to do so since January 3, 1946. [R. pp. 2-6.]

His petition averred that he left that position in Max Kaufman's employ on October 23, 1942, in order to enter upon service in the United States Army, from which he was honorably discharged on November 6, 1945; that in December, 1945, he applied for reemployment and restoration to Kaufman, and was refused; but was employed in the inferior, non-managerial position of utility man at less pay on January 3, 1946; that Kaufman's business was thereafter transferred to the appellee corporation about March 31, 1946 (actually April 1, 1946), the veteran continuing in its employ as utility man; that Kaufman has since operated the business through the corporation, of which he is the dominant officer, director and stockholder; and that the veteran was discharged without cause by Kaufman from such inferior position under the corporation on May 1, 1946. Gimpelson averred that he has always been ready, willing and able to perform the duties of his former position of manager, but has been prevented by the appellees from so doing.

The answers of the two appellees raised various defenses, the most important of which are: (a) that the veteran did not "apply for reemployment" within time, and thereby waived his rights; (b) that Max Kaufman's cir-

cumstances have so changed as to make restoration of the veteran to his former or a like position “unreasonable or impossible”; and (c) that the appellee corporation, which was first chartered January 21, 1946, has never been obligated to him under the reemployment provisions. [R. pp. 7-14.]

The case was tried without a jury on January 10, 1947, before United States District Judge Ben Harrison, who on February 17, 1947, entered findings of fact and judgment sustaining these three defenses and dismissing the petition. [R. pp. 21, 25-26.]

On May 14, 1947, Gimpelson filed his notice of appeal to this Court. [R. p. 27.] The appeal was duly perfected. On September 25, 1947, the time for filing this Brief was extended to November 26, 1947, by order of this Court, on stipulation and affidavit; and a further extension to December 26, 1947, was granted on November 21, 1947.

The facts out of which the case grew are, in brief, as follows:

From January, 1941, until October 23, 1942, Jacob S. Gimpelson was employed by Max Kaufman as manager of his wholesale and retail meat market at 925-927 Temple Street, in Los Angeles California. After March 1, 1942, Gimpelson's pay in this position was a \$35 weekly salary, a flat \$15 per week expense allowance, and 50% of the wholesale, and 25% of the retail, profits of the business. This profit sharing percentage yielded Gimpelson \$2,500 between March 1, 1942, and October 23, 1942, or an eight-month average exceeding \$300 a month. His total earnings in this eight-month period were thus in excess of \$500 per month. [R. pp. 40, 55-56, 93, 103.]

Gimpelson left this position on October 23, 1942, to be inducted into the U. S. Army under the draft. He was honorably discharged from the Army November 6, 1945; applied to Kaufman for reemployment on December 10,

1946; and was refused immediate restoration as manager. [R. pp. 3, 23, 25, 35, 41-43, 60, 71-72, 122-123.] On January 3, 1946, Kaufman put him to work as a utility man, or "handy boy"—so-called by Kaufman—at \$40 per week straight salary, without profit sharing; and he worked in that inferior position from then until Kaufman transferred the business to the appellee corporation on April 1, 1946. Thereafter he continued in the same inferior capacity under the corporation until May 1, 1946, when he was discharged by Kaufman for failing to buy stock in the corporation, and because the veteran was complaining of his inferior position, wage and work. [R. pp. 123-124, 46-48, 66, 68-71.]

In 1942, Max Kaufman also owned another market on Fairfax Avenue, in Los Angeles, and operated it under a different manager. During Gimpelson's military absence, Kaufman sold this Fairfax market. However, his health was not good, and he continued to need, and to employ, a manager for his Temple Street business. Morris Kaufman, Max Kaufman's brother, held this position under Kaufman when the veteran applied for reemployment, and he continues to hold it under the corporation. [R. pp. 66, 120, 136, 141-142.]

In the month of November, 1945, there had been initiated, and on December 10, 1945, and from then until April 1, 1946, there was pending between Max Kaufman and two of his brothers, to wit, the said Morris, and Joseph Kaufman of Chicago, a plan to incorporate, move and expand his Temple Street business, in a new location, with additional capital in an unspecified amount (ultimately fixed at about \$26,000) to be supplied by said two brothers, who were to be stockholders in the corporation. The company was to be headed by Max Kaufman, as president, owning 40% of its stock, with the remaining 60% divided equally between his two brothers; and was to use as its

name "Chicago Hotel, Restaurant & Meat Supply, Inc.," duplicating the fictitious name in which the Temple Street business of Max Kaufman was conducted, to wit, "Chicago Hotel and Restaurant Supply." [R. pp. 2, 7, 11, 37, 102, 132-133.]

There is no allegation nor proof in the record that the restoration of Gimpelson as manager of the Temple Street business would have interrupted or slowed this projected plan of incorporation and expansion. However, it is a fair inference that Morris Kaufman, the then manager, did not approve it, and that Max Kaufman did not wish to run counter to Morris' wishes. In any event, it is the veteran's contention that there is no actual proof whatever that it was "impossible or unreasonable" for Max Kaufman to restore him properly, within the meaning of Section 8(b)(B) of the Selective Training and Service Act.

There was a delay in incorporating and transferring the business. The corporation was not chartered until January 21, 1946; and it did not take over the business from Max Kaufman until April 1, 1946. [R. pp. 3, 24, 48, 99-100, 109, 142-145.] Meantime, Max Kaufman continued to remain the *sole owner and operator* of the business; and from January 1, 1946, until April 1, 1946, he made \$9,295.47 profits therefrom, of which about \$7,265 was from the wholesale and about \$2,000 from the retail branches. If the veteran had been reemployed January 3, 1946, in his former position, his percentage of this profit would have been \$4,131.

Prior to April 1, 1946, Max Kaufman's two brothers had advanced \$11,000 toward their "subscriptions"; and on or about April 1, 1946, they found that, by reason of



an interim increase in the Kaufman inventory (showing the \$9,295.47 profit aforesaid), their proportionate participation would require them to contribute more than they expected for their 60% of the stock; and they argued with Max Kaufman that, as there had been a delay in incorporation and transfer, they should "share the interim profits," *i. e.*, should be credited with their "corporation share" of his \$9,295.47 profits, in diminution *pro tanto* of the money expected from them. Max Kaufman agreed to this; and they were credited with 60% of this profit as a "contribution." They then paid the remaining \$15,000 of their subscriptions, thus arrived at; and the books of the company were so set up, officers elected, and the business transferred. [R. pp. 104-110.]

On December 10, 1945, apparently to prevent being inconvenienced by the veteran's application, Max Kaufman had explained to him the status of the incorporation plan; and requested him to "work with Morris" in an inferior capacity for a time; and led him to believe that, "in about two weeks," *i. e.*, upon the return of Joseph Kaufman from Chicago, at which time it was expected that the corporation would be formed, an appropriate and more suitable place would be provided him in the business. [R. pp. 71-78, 99-100, 109-110, 132-133, 139.] But no better place has ever been offered to him, and he was discharged May 1, 1946, as aforesaid, upon renewing his protests at the delay, and the inferior work, position and pay. [R. pp. 46-48, 66, 68-71, 123-124.]

The difference between the veteran's 1942 \$500 per month earnings as manager, and his \$175 per month salary as "handy boy," is in excess of \$325 per month;

and, as stated above, he lost \$4,000 in profit sharing in January 1-April 1, 1946, or \$1,350 per month during said three months.

The appellees concede that he was not guilty of laches in bringing this suit. [R. p. 77.]

### **Appellant's Theory.**

Appellant contends: That the pendency of the plan to incorporate his business in future did not relieve Max Kaufman of his duty to restore the veteran as manager; that the veteran's application made this duty a matured business obligation, upon which the subsequent organization of, and taking over by, the corporation had no more effect than it did on *any other* business obligation of Max Kaufman. That the corporation, upon taking over the business, became bound with him to this obligation, since all the promoters and stockholders had knowledge of the obligation; and that the subsequent actions of both appellees toward the veteran were and are unlawful. That there is no proof that his brothers were ever "partners" of Max Kaufman, but that if they were, this did not affect the veteran's rights. That the District Court should at least have awarded the veteran \$4,000 as his loss of wages to April 1, 1946, against Max Kaufman; and at most, should have ordered him restored as manager for 12 months, against both appellees, together with all interim loss of compensation or wages.

### **Questions Involved.**

The following questions are thus presented by this appeal:

1. Whether the veteran "made application for re-employment" within 90 days after his discharge from the Army, within the meaning of Section 8(b), *supra*.

2. Whether the pendency of the future plan of Max Kaufman to incorporate, move and expand his business was such “a change in his circumstances” as to “make it impossible or unreasonable” for him to restore the veteran as manager on January 3, 1946.

3. Whether by incorporating the business, on April 1, 1946, with his brothers as stockholders, Max Kaufman could, or did, relieve himself of his statutory obligation to restore the veteran.

4. Whether the corporation, as Kaufman’s successor, became bound by Kaufman’s obligation under the reemployment provisions.

5. Whether there was any substantial evidence to support the District Court’s findings that Kaufman’s business was “run as a partnership” prior to April 1, 1946, and that “in January, 1946, respondent Kaufman neither owned nor controlled the business.” [R. p. 24.]

6. Whether there is any substantial evidence to support the District Court’s findings that the veteran “accepted” the inferior position at less wages “without objection after a full explanation of the changed circumstances,” or its finding that money contributed by Kaufman’s brothers in the reorganization “has increased the capital investment of the corporation to approximately three times the value of Kaufman’s former business.” [R. pp. 24-25.]

7. Whether either of these findings in Questions 5 or 6, *supra*, was actually material, or had any effect on the veteran’s reemployment rights.

8. What relief in equity should have been awarded the veteran, and against which of the two appellees should it have been adjudged.

## SPECIFICATION OF ERRORS.

### I.

There was no substantial evidence to support, and the District Court erred in making, any of the following findings of fact or conclusions of law, to wit:

1. That appellant did not make application for reemployment in his former position or in a position of like seniority, status and pay, within the meaning of Section 8(b) of the Selective Training and Service Act of 1940, as amended, within 90 days following his discharge from the United States Army. [Finding X, Conclusion 2, Opinion par. 1, R. pp. 21, 25. *Cf.* Evidence, R. pp. 41-43, 60, 65, 68, 71-72, 122-124, and Court's comments, R. pp. 84-85.]

2. That the circumstances of Max Kaufman had so changed at the time of appellant's application as to make it impossible or unreasonable for him to re-employ and restore him to his former position, or to a position of like seniority, status and pay, within the meaning of Section 8(b)(B) of said Act. [Finding IX, Conclusion 3, Opinion par. 2, R. pp. 21, 24-25. *Cf.* Evidence, R. pp. 91, 99-110, 113-115, 131-133, 138-139, 142-145, 41-49, 60-63, 72, 76.]

3. That the appellee corporation, as the successor in business of Max Kaufman, was without obligation to the appellant under said section of said Act. [Finding VIII, Conclusion 4, R. pp. 24-25. *Cf.* Evidence, R. pp. 41-49, 61-66, 100-101, 103-106, 109, 113-115, 121-122, 131-133, 134-136, 138-139, 142-145.]

4. That Max Kaufman's business was run "as a partnership" between December, 1945, and April 1, 1946. [Same citations as under No. 3, *supra*.]

5. That there was an agreement between appellee Max Kaufman and his brothers that his said business "would be run as a partnership" between December, 1945, and April 1, 1946. [Same citations as under No. 3, *supra*, especially Evidence, R. pp. 91, 103-104, 108-110 and 142-145.]

6. That the additional monies supplied by Max Kaufman's brothers "has increased the capital investment of the corporation to approximately three times the value of Kaufman's former business." [There is no proof, nor any inference to support this finding which is set out in Finding VIII, R. p. 24.]

7. That appellant accepted the inferior position in which he was reemployed "without objection after a full explanation of the changed circumstances." [Finding IX, R. pp. 24-25. Cf. R. pp. 48-49, 65, 68, 72, 84-85, 123-124, 141-142.]

8. That in January, 1946, Max Kaufman neither owned nor controlled the business where petitioner was formerly employed; and that the appellant was employed in the business under the "new ownership" in January, 1946, and on April 1, 1946, by respondent corporation, in a position different from the one held by petitioner on October 23, 1942. [Finding IX, Conclusion 3, R. pp. 24-25. Cf. Evidence cited under No. 2 and No. 3, *supra*.]

## II.

The clear weight of evidence was, and the District Court should have found that:

1. The appellant on October 23, 1942, left a position, other than a temporary position in the employ of the appellee Kaufman, as manager of Kaufman's wholesale and retail meat business; that his rate of pay was \$35 per week salary and \$15 per week expense allowance, plus 50% of the profits of the wholesale meat business and 25% of the profits of the retail meat business computed monthly; and that appellant left such position in order to perform training and service in the United States Army under the requirements of the Selective Training and Service Act of 1940. [R. pp. 4, 23, 37-38, 51-52, 58-60, 92-93, 103, 118-119.]

2. That the appellant was honorably discharged from the United States Army on November 6, 1945, and in December, 1945, applied to appellee Max Kaufman for reemployment, and was then and at all times thereafter, and is now still qualified to perform the duties of his former position. [R. pp. 3, 23, 25, 41-43, 60, 71-72, 122-123.]

3. That at the time of such application, appellee Kaufman had an arrangement with two of his brothers under which, at a future unspecified date, it was planned to incorporate and expand his meat business; but the charter for said corporation was not issued until January 21, 1946, and it did not take over the business, and Max Kaufman remained in sole ownership and charge thereof, until April 1,

1946; and in the three months January-March, 1946, said business made Kaufman \$9,295.47 profits, of which appellant's share would have been about \$4,131 at his former rate of profit-sharing, if he had been reemployed as manager. [R. pp. 3-5, 24, 60-63, 99-102, 104-106, 108-110, 121, 132-133, 135-137, 139, 142-145.]

4. That the circumstances of Max Kaufman had not so changed, either beforehand, or at any time between December, 1945, and April 1, 1946, as to make it impossible or unreasonable for him to restore appellant to his former position or to a position of like seniority, status and pay; and that he unlawfully refused to do so from January 3, 1946, to April 1, 1946. [Citations just above, under No. 3.]

5. That the appellant accepted employment by Kaufman in the inferior position of handyman, at a straight salary of \$40 per week, on January 3, 1946, relying upon Kaufman's representation to him that when the corporation was formed appellant would be "taken care of"; and that appellant did not then, or later, accept such inferior position as a fulfillment of appellees' obligations under the reemployment provisions. That the corporation continued appellant's employment in such inferior position, at a pay rate of \$55 per week, for two weeks after it took over the business on April 1, 1946; that the corporation took over the business intact, knew of Kaufman's reemployment obligation to appellant and was and is itself bound to him thereby. [R. pp. 3-5, 42-45, 48-49, 64, 67, 72, 123.]

6. That after April 1, 1946, while each was able and obligated to do so, both appellees failed and refused to restore appellant to his former position, or to a position of like seniority, status and pay, in violation of law, and of Kaufman's agreement so to do. R. pp. 5, 42-48, 66, 68-70, 78, 121-126, 133, 141-142.]

7. That appellant is entitled to be restored to his former position, or a position of like seniority, status and pay in the employ of appellee corporation and to be compensated for his interim loss of wages and benefits by appellee Max Kaufman in the sum of \$4,131 up to April 1, 1946, and thereafter by both appellees until appellant shall be restored. [R. pp. 6. 37-38, 42-49, 58-60, 93, 102-106, 108-110, 118-119.]

### III.

The District Court erred in failing to adjudge and decree that appellant was entitled by law on January 3, 1946, to be restored to his former position as manager of the appellees' meat business, at his former rate of pay, and is now so entitled; and in failing to order the appellees to restore him thereto, or to a position of like seniority, status and pay, and to compensate him for the loss of wages specified in Specification II(3,7), *supra*. (50 U. S. C. A. App., Secs. 308(b)(B) and 308(e).)

### IV.

The District Court's judgment dismissing the petition should be reversed and appropriate relief here administered, or ordered on remand.



## THE FACTS.\*

### In General.

(1) In 1936, appellant Jacob S. Gimpelson, then 22 years old, came to Los Angeles, California, from the East to work for Max Kaufman in the latter's meat business. Kaufman was the husband of a sister of Gimpelson's father. Gimpelson is not related to Joseph or Morris Kaufman. [R. pp. 38, 48, 50.]

(2) Joseph Kaufman was in the gasoline business for himself in Chicago, Illinois. [R. pp. 101, 121, 134.] Morris Kaufman operated a retail store of his own at Wilshire and La Brea Boulevards in Los Angeles. Some years before he had been a partner in business with Max Kaufman. [R. pp. 41, 74, 121.]

(3) From 1936 until April 1, 1942, Max Kaufman owned and operated a wholesale and retail meat market at 925-927 West Temple Street in the fictitious name "Chicago Hotel and Restaurant Supply," the wholesale branch being at 925 and the retail at 927 West Temple. [R. p. 37.] The business employed two outside salesmen using automobiles (one for the west side, one for the mid-town area), truck drivers, butchers, handy boys, etc. [R. pp. 39, 80-83.]

(4) Gimpelson worked in this market for seven years (1936-1942), until he was drafted into military service. He made a very good employee, as evidenced by Max Kaufman's 1944 letter of recommendation, and Kaufman expressed desire to keep him in his employ, even after his return from the war. [Exhibit No. 2, R. pp. 20, 42-45, 73-74, 123-124, 128-130.]

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\*To save later repetition, a digest of all the evidence, divided into factual propositions, and by numbered paragraphs, is here given.

(5) Gimpelson had worked as “handy boy” or utility man, meat cutter, deliveryman, outside salesman and meat buyer [R. pp. 57, 59], and in the words of Max Kaufman’s letter, was “thoroughly capable in handling any jobbing or retail meat problem which may arise.” [R. p. 20.]

(6) In the latter part of 1940, Gimpelson went to New York to visit his family; and in *January, 1941*, upon his return to Los Angeles, he *was made general manager* of the Temple Street wholesale and retail meat market by Kaufman. [R. pp. 37-38, 80-83.] Thereafter, in association with Kaufman, he supervised the operation of the place, purchased all shop supplies, bought most of the meats (Kaufman buying the rest), selected and directed the work of the employees, fixed the sale price of meats, and supervised the outside salesmen.

(7) About this time, Morris Kaufman, whose business at Wilshire and La Brea had closed, was employed by, and worked under, Gimpelson in the Temple Street market. [R. pp. 41, 49, 74.]

(8) Notwithstanding his duties and responsibilities as manager, after January, 1941, Gimpelson’s pay, until March 1, 1942, was meager. Thus, from January, 1941, when he became general manager, until October 8, 1941 (a year before his military service began), his wage was only \$17 per week, plus \$8 per week expense allowance. From October 8, 1941, until March, 1942, his wage was only \$25 per week, plus \$8 per week expense allowance. [R. pp. 52-53, 92.] There were some bonuses given to all employees, of inconsequential size, which he also shared. [R. pp. 54-55.]

(9) On March 1, 1942, a *new compensation agreement* was entered into *between Gimpelson and Kaufman*. Under this, Gimpelson was to receive a salary of \$35 weekly, a \$15 per week expense allowance, plus 50% of the profits

of the wholesale business and 25% of the profits of the retail business done at the market. [R. pp. 4, 12-13, 37-38, 51-52, 58-60, 93, 118-119.] Monthly profit and loss statements were prepared, from which Gimpelson's share could be computed, though he did not draw them monthly.

(10) This profit sharing agreement netted Gimpelson \$2,500, in addition to his \$50 per week salary and allowance, during the eight months between March 1, 1942, and his induction on October 23, 1942. His monthly earnings were thus over \$500. His \$2,500 share in the profits was settled at the time of his departure for military service, at an accounting participated in by Gimpelson, Kaufman and William E. Asimow, Kaufman's accountant. [R. pp. 40, 55-56, 92, 103.] For this accounting, Mr. Asimow had compiled some profit and loss statements [Petitioner's Exhibit No. 1, R. pp. 15-19], and these were used in computing and adjusting the amount then due Gimpelson. [R. pp. 117-118.] Exhibit No. 1 shows that during this eight months' period, March-October, 1942, the net profits of the wholesale business totaled \$4,147.65, of which Gimpelson's 50% would have been \$2,073.83, and the retail net profits \$3,192.66, of which Gimpelson's 25% would have been \$798.16; and that Gimpelson's share of both would thus have been \$2,871.99. However, in adjustment and settlement, the parties agreed to a reduction in view of depreciation, and in view of the fact that Kaufman had received no salary, while Gimpelson had. [R. p. 103.] They settled Gimpelson's share at the round figure \$2,500. Of this amount, \$1,500 was paid him in cash at that time. The other \$1,000 was left "in the business," at Kaufman's suggestion, because "the finances of the business were not too strong." At Gimpelson's direction this \$1,000 was paid in installments to his mother after his departure. [R. pp. 79, 93, 55-56.]

(11) Gimpelson and Kaufman parted very good friends, and there can be no reasonable dispute about the fact that the profit-sharing arrangement was intended when made, and until after Gimpelson's departure was, for an indefinite future period, i. e., there can be no dispute that it was "*other than temporary*" within the meaning of Section 8 of the Act, notwithstanding the defense argument on that point.

(12) Thus, Gimpelson [R. pp. 58-60] testified why it was made, and for how long it was to be effective, as follows:

Q. By Mr. Mellinkoff: Did you have any agreement with Mr. Kaufman, Gimpelson, before the war as to how long this percentage arrangement was to run? A. No agreement, sir. I assumed it was to go indefinitely.

The Court: It isn't a question of what you assumed. Was there an agreement?

The Witness: No, sir.

Q. By Mr. Mellinkoff: Was there anything in writing? A. No, sir.

The Court: Let us find out when this new arrangement was made. You said in March.

The Witness: Yes, sir.

The Court: Before you went into the service?

The Witness: Yes, sir.

The Court: What were you doing prior to that?

The Witness: The same thing I was doing after March.

The Court: Well, what was the occasion of the change in your arrangement at that time?

The Witness: This goes back to what I started to say, in 1940—

The Court: I do not want to go back to 1940. You had, as I understand, an arrangement for a

percentage of the profits. What brought that about? What brought the change at that time?

The Witness: I had been working very hard in the place. I had been selling, I had been buying, I had been cutting meat. I had been delivering orders.

The business had not been very solvent. Mr. Kaufman owed the packing houses for several weeks meat bills. We had not very good equipment. Mr. Kaufman said that if I would bear with him and work at that low salary, work with him until we had money in the bank, until the business was established solidly then he would give me whatever I wanted from the business. He led me to believe that the business would some day be mine. He told me so in these words. He said he had two children. He had a son who was studying to be a doctor and he had a daughter who was married to a big shot in the Philippines and that neither one of them needed the business; that I was the only one in the family who had ever done him any good in the business or who had an interest in the business, and he said if I bore with him, worked with him in the business at that low salary until the business was solid, then he would take care of me when the business was solid. He told me that I was to receive \$25 a week salary and a 7 per cent commission on all the business which I did. He never gave me that 7 per cent commission. In lieu of that he said, after I had earned—worked there a long time, he said that he would give me whatever I wanted when the business was solid.

In the beginning of 1942 the business was solid and I talked with him and we derived at this profit-sharing arrangement at that time.

The Court: Proceed. [R. pp. 58-60.]

(NOTE: The \$25 salary mentioned above began October 8, 1941 [R. p. 53].)

(13) William E. Asimow, Kaufman's employee, accountant and counsellor ever since 1929 [R. p. 91], testified for appellees concerning the 1942 accounting [R. p. 93], as follows:

Q. Was there any statement made at that time by either party to the effect that this arrangement was one that was to continue? A. You are asking me to state my opinion?

The Court: Not your opinion. What was said?

The Witness: Well, as I recall it, after the amount had been agreed upon between the parties, Kaufman drew a check or had me draw a check for \$1,500.00, and Jack agreed to accept the balance in weekly payments to his mother. They shook hands on the deal and they seemed to be very friendly at the time. I don't—the only understanding, I think there was between them at that time as to the future relations, was *that when Jack got out of the Army there would always be a place for him if he wanted to come back*. Under what conditions he would come back, that is, percentage-wise, there was no definite understanding as to that.

The Court: There wouldn't have to be. The law fixes that. [R. p. 93.]

(14) Even Max Kaufman, interrogated by the Court, testified to the same effect, i. e., that *he did promise the share of profits claimed*, although he says it was "to make him (Gimpelson) happy." He admitted that if Gimpelson had not gone into military service, he would have continued there. [R. p. 119.]

(15) This made unanimous *all* testimony on the point that the profit sharing agreement *was made for indefinite future duration*. The District Court orally overruled the defense contention that it was "temporary" [R. pp. 51-52, 68, 95-96]; and this was manifestly correct.

(16) From 1939, or earlier, until 1943, Max Kaufman also owned and operated a retail meat market on Fairfax Avenue, in Los Angeles, under another manager. [R. pp. 39-40.] *In 1941*, due to the *then pending objections* of the City Health Department, Kaufman testified he was thinking of moving his wholesale department from Temple to Fairfax. [R. p. 119.] He did not do so, however; and in 1943, he sold the Fairfax market, due to "rationing and points." [R. pp. 83, 107, 120.]

(17) After this sale, Kaufman devoted all his time to the Temple Street market. [R. p. 120.] However, this was no novelty; for he previously "spent practically all his time on Temple Street" [R. p. 39], where, with Gimpelson, who also worked as outside salesman, downtown, he bought meat supplies and gave directions to employees. [R. pp. 20, 81, 83, 94, 40, 56-58, 128-130.] Gimpelson testified, without any contradiction:

"He spent practically all his time on Temple Street." [R. p. 39.] "His major duties were (a manifest typographical error meaning 'at') the Fairfax market or major function was to collect or count money in the till at the end of the day, to make the deposit and to ask the manager if there was anything he needed in the way of meats, so that when he might go out to purchase meat for the wholesale, he would purchase meat for the Fairfax market too." [R. p. 40.] (Explanatory parentheses inserted.)

(18) Gimpelson was inducted into the United States Army on October 23, 1942, the same day that he terminated with Kaufman. He entered upon active duty on November 5, 1942, and was honorably discharged November 6, 1945 [R. pp. 3, 23, 35], after completing three years active duty, some of it overseas. [R. p. 42.]

(19) Harry Priester was hired by Kaufman to take Gimpelson's place, when he entered the Army. [R. p.

120.] At the time of his return, Morris Kaufman was manager of the Temple Street business. [R. pp. 141, 122-123.] The Record does not disclose when Priester left and Morris Kaufman became manager, but as there is *no evidence, and no claim*, so far as appellant's counsel has heard, that Max Kaufman was ever *without a manager* to aid him in the Temple Street business, the presumption is that Morris Kaufman succeeded Priester. [R. pp. 42, 136, 141.]

(20) Max Kaufman was afflicted with enlargement of the heart, and had been advised by his physician (his son) not to be active in business. [R. pp. 23, 121-122.] For this reason, he *needed managerial assistance* on Temple Street, and without it, he intended to retire. [R. pp. 23, 121-122.] To use his own words: "I couldn't run it any longer."

(21) Thus at the time of the veteran's return, Max Kaufman's circumstances had not so changed as to make it "impossible or unreasonable" for him to *employ some manager on Temple Street*, which in fact he did. From any viewpoint, therefore, the 1943 sale of the Fairfax market is totally immaterial. If Kaufman's circumstances had been changed thereby, they had *changed back again* before the veteran's return; and the total result was *nil*.

**A. The Veteran "Made Application for Reemployment" Within Due Time; and Did Not Waive His Rights.**

(22) Gimpelson testified [R. pp. 42-49, 61-72] that on December 10, 1945, he made application for reemployment to Max Kaufman; that on January 3, 1946, he was given temporary work in an inferior position, at less pay, but with a promise, *on which he relied*, that a more suitable position would be provided for him shortly; that he objected repeatedly to the delay and to the inferior work; and that he was finally discharged on May



1, 1946, after the corporation had been formed and had taken over the business on April 1, 1946. Thus he testified:

(a) That he applied for reemployment. [R. p. 41.]

(b) That:

“I got back to Los Angeles on December 8th. On December 9th I called Mr. Max Kaufman and exchanged greetings with him. On December 10th I went down to see him. I talked with Mr. Max Kaufman on December 10th. Mr. Kaufman took me in back of the building and showed me a building, a framework of a building which he was in the process of constructing.\*\* He said that he had hoped to have that building finished for me when I got back.

“He said that—I believe this is pertinent to the case. He said that he had hoped to make a corporation when I got back and in the corporation would be a brother Joe, who he said had come in from Chicago while I was on the way back from Iwo Jima, and he said that his brother Joe had made a lot of money in the gasoline station business in Chicago and was interested in going into the meat business with him in Los Angeles.

“He said he hoped to make a corporation between the four of us, his brother Joe, Morris, myself and himself. And he said that he had hoped to use this building as the home of the corporation; that he was then in the process of purchasing a piece of property opposite the bank on Temple and Fremont, and he

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\*\*This was a building begun by Max Kaufman on Temple Street before his brothers became interested in the incorporation negotiations, and which was later moved to the Fremont Street location after the veteran's return. It was not the new building on Fremont Street that was built by Joseph Kaufman, although it was incorporated in the improvements on Fremont Street. [R. pp. 42, 62-63, 138-139.]

was also dickering with some house movers to move this framework of a building to that property.

"Mr. Kaufman said that he hoped that when I got back to work that I would have patience with his brother, Morris Kaufman, who was then running the place.

"He said that his brother Morris had carried the load while I was in the service. His brother Morris had been working very hard, was nervous and excitable and that if I would have patience with him he would make everything right. That Joe knew how to handle Morris; when Joe come in from Chicago, come into the business, that Joe could handle Morris very well and everybody would be happy. . . .

"Then he told me that if I went back there I would find that it was much easier to do business now; that it was not necessary to cater to customers and that if I would just work with Morris for a while until Joe come back and did whatever was necessary for the business that he would smooth out any difficulties when Joe come back." [R. pp. 42-43.]

That all this conversation occurred on December 10, 1945; and that he did not go to work immediately. That—

"I told Mr. Kaufman that I needed an automobile and a place to live and I would appreciate some time to find both.

"He went with me to Cook Brothers to try to get an automobile. He did not offer to help me to find a place to live. I found a place to live. I got sick. I was sick for approximately two weeks. The first time in my life I was sick, and then after I recovered from the flu I went back. This was before the holidays.

"I saw Mr. Kaufman. He suggested that I go to work after the New Years; that things would be all mixed up and Morris was excited as it was, and it would be better if I went to work after the New Years.

"I went to work on January 3rd of 1946." [R. pp. 43-44.]

"I didn't ask Mr. Kaufman how much money I was getting but Mr. Kaufman on pay-day called me into the office and said that he knew I didn't care about the hours or the actual compensation and that if he gave me \$40 a week it would keep Morris happy and that he would make it up to me when Joe came back." [R. p. 44.]

(c) That he went to work and continued to work under this promise. [R. p. 44.] That—

"I was working as a general flunky around the place. Just doing whatever was told me to do—boning meat, scraping the blocks, washing down the walls, hanging meat in the icebox, cutting meat."

That this was not the type of work he did before his entry into military service; but that he continued at it until about April 10th, 1946. [R. p. 44.]

(d) That—

"Mr. Kaufman told me that he would make everything right when Joe came back—Joe Kaufman came back from Chicago, I would say, sometime in February, the early part of February. At that time, Mr. Kaufman showed no inclination of making anything right. I asked Mr. Kaufman repeatedly if he couldn't use me—couldn't use my abilities to better advantage than doing the type of work I was doing, and he kept stalling me and telling me he would make things

right when Joe came back. When Joe came back there was no sign of making things right. They still kept me doing that work and Mr. Kaufman said, 'There is nothing to talk about now'; that before the corporation was formed he would take care of me and everything would be all right; that there was no point in talking about things now." [R. p. 45.]

(e) That the formation of the corporation, and the taking over of the business by it, was simultaneously announced on April 1st, 1946; and that his (the veteran's) pay for that week was split in two, as of that date, between Max Kaufman and the corporation. [R. pp. 45-46.] That—

"Mr. Kaufman (told us the corporation had been formed) on April 1st and he said, 'Well boys,' and he put his hands here, he says, 'today is April Fool's Day but don't let yourselves be fooled. I am president of the corporation,' looking right at me when he said that. That is when I learned that the corporation had been formed." [R. p. 45.]

"Well, on April 1st (or 10th) approximately, Mr. Kaufman took me down to his attorney and I talked with Mr. Kaufman at his attorney's, in Mr. Mellinkoff's office, and they suggested to me that it was—I told them that I believed that I had certain rights to my old job, to my seniority, status and pay that I had enjoyed previous to going into the service. Mr. Mellinkoff and Mr. Kaufman told me they felt that things could be worked out in the corporation; that I should take a vacation for a couple of weeks; that he would give me \$200 for a vacation and that when I came back we would have a meeting in Mr. Mellinkoff's office, and Mr. Kaufman instructed Mr. Mellinkoff to talk in my behalf as regards that—my

place in the corporation, what I could expect from the corporation and what the corporation could expect from me.” [R. p. 46.]

That he took the \$200 and went on a vacation for two weeks, and returned just before May 1st, 1946 [R. pp. 46-47], but did not go back to work, because—

“I went back and saw Mr. Kaufman and Mr. Kaufman asked me if I had found a business yet. I told him I hadn’t looked for a business, and he suggested that I buy a house. He said, ‘Any kind of a house.’ He said that I rent out rooms in that house. ‘There is lots of money to be made in that.’ I told him I wasn’t interested in that; that I was interested in the meat business and I asked him if he had made an appointment with Mr. Mellinkoff and his brother(s) so that we might all get together and talk over my place in the corporation and what the corporation could expect from me, and he told me that he had not; that he had nothing to talk to me about the corporation.” [R. p. 47.]

“He said that if I wanted to have patience and wait until he got his sausage factory built he would have a job for me in selling sausage.” [R. p. 47.]

That he (Gimpelson) asked to go back to work in the Temple Street business, and that—

“I told him that I felt I was entitled to have my old job back and he said that, ‘We are getting along very well without you and there is no reason why you should come back. We don’t need a business man to run a meat business now. Anybody that has got meat is king and I am going to have meat,’ and he said, ‘If you want to buy some shares of stock in the corporation I will talk it over with my brothers and see if you fit in.’

"I said I didn't want to buy it. I said that I didn't think I would have to buy shares of stock to get my old job back." [R. pp. 47-48.]

That he was thus discharged, and could not have continued his employment after this date. [R. p. 66.]

(f) On cross-examination by Mr. Mellinkoff, the veteran testified that at the time of the advancement of the \$200 for a vacation—

"You and Mr. Kaufman told me that Mr. Kaufman and his brothers were intending to have a big business; and that they were figuring on having me in that business; that from a long range viewpoint, I should be interested in staying with that business because there was a need for that type of business in Los Angeles. That Mr. Kaufman thought that I was a very good man and that he wanted me in that corporation and that he knew there wasn't enough work there for my abilities at the present time. This is what Mr. Kaufman said. And, that when the sausage factory was built that there would be plenty of work for me as a sausage salesman, or in charge of the sausage department. And, I told you and Mr. Kaufman that I didn't know anything about the sausage business; that I was a manager of a wholesale and retail meat business." [R. p. 67.]

That when that conversation broke up—

"The understanding was that I would take a vacation for two weeks and during that time Mr. Kaufman would talk with his brothers and would decide where I fit into the corporation and what the corporation could expect from me, and that when I returned from the vacation that we would have a meeting in your office and you would speak in my behalf to fit me into that corporation." [R. p. 68.]

That when he returned from the vacation, he had a conversation with Max Kaufman—

“It took place in the new building which Joe Kaufman was building and then we walked along the block to the old business, to the wholesale, and we talked in back of the wholesale . . .

“Well, I asked Mr. Kaufman about my old job; if he had had a meeting with you and when I was to meet with you and his brothers, and he said that he had that—that they were getting along very well now without me; that they were making more money than they ever made with me, and that unless I chose to buy shares of stock in the corporation that they did not need me . . .

“He said—I told him that I had—that I had been told by attorneys that I had legal rights as well as moral rights to have my old job back; that I hoped he would not force me to exercise my legal rights . . .”

“I showed him an extract from the Selective Service law and in the extract it stated I was entitled to have my seniority, status and pay which I formerly enjoyed. And I asked Mr. Kaufman to please take it to his attorney and show it to his attorney and see if we couldn't get together to arrive at an amicable solution of this, and whether he liked it or not the relationship still existed; that it was extremely unpleasant for me to have publicity as regards our relationship and business. I asked him if he couldn't possibly work this thing out satisfactorily and he said, 'It looks like you will only be satisfied with legal means.' His words were not 'legal means.' He said, 'You will only be satisfied to turn this over to the lawyers.'” [R. pp. 69-70.]

(g) That he had made repeated objections to Max and Joseph Kaufman concerning his inferior duties and the

delay; that he had not discussed his reemployment with Morris Kaufman who had been under him when he entered the Army [R. p. 49], because "Morris Kaufman is a difficult man to talk with" [R. p. 48]; but that "in the middle of February," "about two weeks after Joseph Kaufman had come back" from Chicago [R. p. 48], which return was on February 7, 1946 [R. p. 138], he talked to Joseph Kaufman, under the following conditions—

"Joe Kaufman had asked me what the difficulty was between Morris and myself that could not be ironed out and I told him that the difficulty could be ironed out if somebody would work on it, but nobody was attempting to work on it. 'It looks like they are just trying to aggravate the difficulty,' and I asked Joe Kaufman if he didn't know that before I went into the service I was getting 50% of the profits of the wholesale and 25% of the profits of the retail, and Joe Kaufman told me that Max had told him that I was getting 40% of the profits of the wholesale and 25% of the profits of the retail, and I told Joe that his brother Max had lied to him when he said only 40%. I suggested to Joe that we go in to see Max now and find out if I wasn't getting 50% and Joe said, 'Well, what difference does it make anyway, stuff like that?' . . .

"I had asked him (Joe) if he didn't know that I was running the business before I went into the service. He said he did know that." [R. p. 49.]

Gimpelson testified that he first objected to Joseph Kaufman concerning the low \$40 per week salary in the middle of February, but that before that—

"I talked to Max Kaufman many times. I told him it was extremely difficult to work under the conditions I was working under . . . I told him rent was very high, living conditions were very high. It



was difficult for me to get along on that kind of money unless I dug into my savings." [R. p. 65.]

Q. Was anything said about the percentage deal? A. No, sir, It wasn't at that time.

Q. Nothing was said about that until after Joe came back, is that right? A. That is right.

Q. Was anything said about your position, so-called position as general manager? A. Yes sir, it was.

Q. When was something said about that? A. *About a week after I had been there.*

Q. Well, now, when you first came back was there anything said about your job as general manager? A. Wasn't said in so many words. It was said indirectly. Max Kaufman asked me to go to work and work with Morris.

Q. Did he tell you what you were going to do? A. He said that I should just work with Morris. He left it up to me to do the work that was necessary for the business. [R. pp. 65-66.]

(h) Gimpelson's final testimony on the entire subject came on cross-examination as follows [R. pp. 71-72]:

Q. Now, you have testified that up until sometime in the middle of February that nothing at all had been said in regard to this profit-sharing deal. Is that correct? A. I believe so, reasonably correct, yes sir. Let me qualify that. I was assumed if I did get my old position back—

Q. Who assumed that? A. I did. And I hoped Mr. Kaufman did.

Q. Was anything said about it? A. No sir, I don't believe it was.

The Court: As I understand your testimony it was not until about April 1st that you made any protest?

The Witness: *No sir. I made protests from the first week I had been there as to the nature of my duties and to the position which I held and had been reassured each time.*

The Court: By whom?

The Witness: By Mr. Kaufman, that first I would be given my old job back and everything would be taken care of when Joe came in; that that would take place in about two weeks. Joe didn't come in until about six weeks and I struggled along and then he said the corporation would be formed very shortly and that I would have everything I wanted before the corporation was formed. *And I struggled along like that under that promise, assuming that my old job would be given to me in a short time.*

Q. By Mr. Mellinkoff: Now wait a minute. Was anything said that you were going to get your old job back, or they were going to make a place for you? A. They said *everything would be taken care of*. They were the words he used. Those were the words used.

Q. *Those very words?* A. *Yes sir.*

Q. Was anything said that you were going to get your old job back? A. Not in those words, no sir.

Q. Very well. They did talk about putting in a sausage department?—

The Court: I have heard enough about the sausage.

Mr. Mellinkoff: Very well, your Honor. [R. pp. 71-72.]

(23) Max Kaufman's version of these events was as follows [R. pp. 122-123]:

“When Gimpelson came back I just opened my arms like a father. I explained to him every bit of it.” . . .

"I said, '*Jack, I don't own this any more. It is a corporation. Probably, the corporation will be effected maybe in a couple of weeks.*' I didn't know how long it will take. And I asked my brother Morris, he is right there, how much should I—what kind of a salary I should put on for Jack because he didn't have the job what we had before and the meat line was—we couldn't get meat. It was hard to get. It was rationing. So we just got that much. So Morris said, '*He is not a butcher. He can be a handy boy. He is a good boy when he wants to be and \$40 is the highest we can go.*'

"So I took in Jack. I said, '*Jack, they are going to allow you only \$40 from the business—the business belongs already to the corporation.*'

My brother—we started in before January yet this is in December. 'I will give you \$25 from my own pocket. *I want you to be satisfied and then we will build up the new plant. We will probably be able to give you a job that will fit you better in it,*' and with the same proposition I came to Mr. Mellinkoff." [R. pp. 122-123.]

"He was satisfied for two months. On the third month he started to fight with my brother." [R. p. 124.]

"Then it was happened. He quit once. He quit. He wants to quit. In fact, he wanted to quit two weeks before and I hold him back. *I really meant to hold him in my business. . . .*" [R. p. 124.]

Q. Then when he came back after you had paid him that \$200 and he want away for a while and then he came back, then did he come in to see you?  
A. He did.

Q. And what conversation took place at that time? A. Not so good.

Q. Well, tell the judge what happened. A. He scared me with the OPA—that is, *my brother not making out the bills good and all.* [R. 124-125.]

(24) This mention of OPA had reference to the cross-examination of Gimpelson, as follows:

Q. Now let me see. Do you recall anything like this being said? Do you recall that you said to Mr. Kaufman on this occasion that you are speaking of, that you knew some people down at the OPA. A. I did know people there. I don't recall ever saying it to Mr. Kaufman. I may have.

Q. Do you recall something to the effect, saying something to the effect that Morris Kaufman did not know how to make the bills properly. A. I said Morris Kaufman *didn't know how to read and didn't know how to write* and insisted on making out the bills.

Q. And didn't you say to Mr. Kaufman that unless he took you back that he was going to get in trouble with the OPA. A. I told him that it was extremely likely that he would.

Q. That he would what? A. Get into trouble.

Q. With the OPA? A. Yes, sir.

Q. Unless he took you back? A. No, sir. *Unless he had the bills made out properly.* [R. pp. 70-71.]

(25) After he quit, or was discharged, on May 1, 1946, the veteran on September 13, 1946, was employed by the OPA at a salary of \$3,397.20 per year, and continued in this employment under the Office of Temporary Controls. He was an employee of the OTC on the date of trial, January 10, 1947. [R. pp. 34, 74-75.]

(26) Until the trial, the veteran's total earnings were: In 1946, the pay of an army sergeant; and in 1946, a total of \$720 from the appellees, of which \$520 was salary and \$200 vacation pay, and \$810 from the OPA, or a \$1,530 total for the year 1946. [R. pp. 74-75.]

**B. Max Kaufman's Circumstances Have Never so Changed as to Make It "Impossible or Unreasonable," Under the Act, to Restore Gimpelson as Manager, or to a Like Position.**

(27) If he made it, as he claims, Max Kaufman's statement to Gimpelson on December 10, 1945, that "I don't own this (business) any more. It is a corporation," and "the business belongs already to the corporation," was a misstatement of fact. [R. pp. 122-123.]

(28) That he knew it to be a misstatement is shown by the fact that on March 30, 1946, two days before the April 1, 1946 transfer of the business, he gave correct information when interviewed by Walter Charles Richardson, an investigator for Dun & Bradstreet, credit reporters, who had been sent to make inquiry of Kaufman on this very question, in response to a commercial query Dun & Bradstreet had received. [R. pp. 142-145.] With his report of that interview before him, Mr. Richardson testified that on March 30, 1946, Max Kaufman told him that he (Kaufman) was the *sole owner* of the business *on that date*. [R. p. 143.]

He further testified as follows:

"No, he didn't tell me it was incorporated. He said there had been plans, but no issuance of stock at the present time . . . He told me that his two brothers were interested, were going to be officers in the corporation . . . No, he didn't tell me they had put money in." [R. pp. 143-144.]

"Q. Did he tell you specifically, that he confirmed the filing of the corporation articles, but stated as yet no application had been made for issuance of stock and that *he remained the sole owner of the business*? A. That is right" . . . [R. p. 144.]

“He used the words—I asked Mr. Kaufman, I said, ‘Well, Mr. Kaufman, *has this business been incorporated as of yet?*’ And he said, ‘*No, it hasn’t,*’ and I said then, ‘*You are still the sole owner of the business?*’ And he said, ‘*Yes, I am.*’” [R. pp. 144-145.]

“May I clarify one thing, your Honor? I went out to interview him because a questionnaire had been sent to the office asking *if this business had incorporated.* It was a commercial inquiry.” [R. p. 144.]

(29) Although Max Kaufman denied making these statements to Mr. Richardson on March 30, 1946 [R. pp. 131-133], the fact remains that they were a *precisely correct statement of the then status of the business*, as repeatedly testified to by William E. Asimow, Kaufman’s accountant since 1929 [R. p. 91], who said:

“It was the *sole business of Max Kaufman* with the understanding, of course, that these other parties were to participate in the profits.” [R. p. 109.]

It was thus the same type of arrangement that *Gimpelson* had with Kaufman prior to his induction; yet, neither the parties, nor the Court, considered Gimpelson a “*partner.*” [R. pp. 37-38, 119, 23-24.]

(30) Negotiations between Max Kaufman and his brothers Joseph and Morris, looking to the incorporation began in November, 1946 (the month of the veteran’s discharge from military service), upon the arrival in Los Angeles of Joseph Kaufman of Chicago, for a visit. [R. pp. 35, 42, 101, 121, 134.]

(31) At that time, Max Kaufman was not in robust health; and the rented property in which the Temple Street business was housed had been condemned for

highway purposes by the state, and would some day have to be vacated, although not immediately. [R. p. 119.] Kaufman discussed his business problem with his brother, who had in mind selling his Chicago business and coming West. They decided to incorporate, move and expand Max's business, with money to be raised from the sale of Joseph's Chicago business. [R. pp. 135-138, 100-102.]

(32) Kaufman's problems presented no *immediate emergency*. For—

(a) In so far as his health is concerned he still continues in active business, exactly as formerly, and at all intervening times. [R. pp. 133, 121-122.]

(b) The state highway condemnation proceeding, although filed in December, 1944, had not, at the time of trial, resulted in any evictions from the property. In fact, at the time of trial, January 10, 1947, the retail market was *still operated at the same location*, with no move in sight. The wholesale market was voluntarily moved by the corporation to the new location on Fremont Street in October, 1946. [R. pp. 23, 62, 76, 97-98, 120.] The state never set any time limit upon the occupancy of the premises, so far as the record discloses.

(33) Max Kaufman, in 1945, had begun some improvements on his Temple Street property; but did not wish to finance the acquisition of a new location *with his own money*. [R. pp. 42, 62-63, 138-139.]

(34) Mr. Asimow described and outlined the incorporation plan, arising under these circumstances, as follows:

“As I say, Joseph Kaufman came from back East in November, and Max approached him with the idea of putting this capital into the business *in order to*

*put up a building* because they could no longer continue under their present circumstances and he felt that if he—that he would rather go out of business than risk his own capital in this new venture and that if Joseph Kaufman, who was looking for a proposition at the time, was interested they would all pool their resources and *put up this building* and *incorporate it* and so share the responsibilities and the risk involved.” [R. p. 101.]

(35) Max Kaufman described the plan as follows:

“After my younger brother Joe came and Morris was in the business—I used to be in business with Morris . . .

“So Joe propositioned me. He is going to *invest money to build this new place*, a sanitary place, and Morris went in with it, so we made between ourselves an agreement and they were satisfied with my leadership, not to work too hard. We should continue in this business, and I am very happy they were.” [R. pp. 121-122.]

(36) Joseph Kaufman described and outlined the plan as follows:

The Court: What was your agreement? Under what circumstances did you make a deposit upon this ground? What agreement did you have with your brother Max?

The Witness: Your Honor, when I came here I found out that my brother has to go away from the business, that his place is going to be taken away by the State. He was downhearted a little bit after being in business so long in one place, so I tried to cheer him up. I said, ‘Nothing is lost yet. We don’t know. And I might go in with you. We will see what we can do.’ And I talked it over with my



middle brother, Morris Kaufman, and then I spoke to Max again and I give him a proposition.

The Court: What proposition did you give him?

The Witness: I said, 'Max, what is the use of being downhearted and being sick about it? We will go in. We will build up a new business, and real good, going business, and we will be proud of it and I will make you proud of the business that you are in right now,' and I am trying to do that, your Honor.

The Court: Well, did you have any understanding at that time as to the shares? Did you have an understanding with reference to the 40, 30 and 30 basis?

The Witness: Not that my brother asked for it, but his accountant asked for 51 per cent.

The Court: His accountant did?

The Witness: Yes. You know a matter of routine—just conversation. So I explained to him I wouldn't give up a business in Chicago and sell out and come here to my brothers and feel that I only got a minor part in the business. I said, 'I think I am capable of taking an active part and it wouldn't be fair to all of us but it would be fair,' being that he is in the business, you should go in 30, 30 and 40.

The Court: When did you agree on that?

The Witness: That was in 1946, your Honor.

The Court: *When did you decide to incorporate?*

The Witness: *Right then and there when we went out to buy a piece of ground.* I came in when I made up my mind and I set my mind to business immediately and went out to look up the piece of ground and I gave a personal check, deposit of \$2,000 immediately. [R. pp. 135-136.]

(37) The new site selected was on Fremont Street, not very far from the Temple Street site, and a purchase

agreement was made in the name of the proposed new corporation, "Chicago Hotel, Restaurant and Meat Supply, Inc." with Joseph Kaufman making the \$2,000 earnest money down payment. This land purchase deal was in escrow on December 10, 1945, when the veteran returned and applied for his job. [R. pp. 42, 99-100, 139.]

(38) Joseph Kaufman's first \$2,000 was paid on December 6, 1945, and on the same day Morris Kaufman gave Max Kaufman a \$5,000 check, which Max Kaufman had in his pocket uncashed when he talked to the veteran on December 10, 1945. [R. pp. 139, 140, 61, 63.]

(39) Immediately after making the \$2,000 payment, Joseph Kaufman left for Chicago to dispose of his old business there; and was expected to return about the first of the year, with the balance of the money necessary to finance the enterprise, including the financing of his brother Morris' share in the business. [R. p. 137.] Joseph Kaufman was in Chicago for this purpose when the veteran made application on December 10, 1945. [R. pp. 134-139, 99, 44-45, 68.] He says he told his brothers that:

"I will come back when I liquidate my business in Chicago and I come back. As far as money is concerned I told my brothers not to worry about it, I will finance it all the way through as much as we need for this kind of business and that he should be proud of what I had in mind about another business, manufacturing sausage." [R. p. 138.]

(40) Joseph Kaufman did not return to Los Angeles until February 7, 1946, although before that time he had sent another \$4,000 for the building project. This made the sums advanced by himself and Morris Kaufman total \$11,000, prior to his return. The remaining \$15,000 of the \$26,000 credited to the two brothers, came in on or

about April 1, 1946, and in view of this, the corporation was organized and took over on April 1, 1946, Joseph and Morris Kaufman then becoming the owners of 30% each of the stock and Max Kaufman 40%. [R. pp. 138-140, 99-100, 108-109.]

(41) They said they had agreed in November-December, 1945, that Max Kaufman was to own 40% of the corporation's stock, Joseph Kaufman 30% and Morris Kaufman 30%; but the value of Max Kaufman's business was not then determined, nor was it then determined what sums the brothers would put in. These various amounts were not settled until April 1, 1946. [R. pp. 21, 48, 73, 100, 105.]

(42) The charter for the new corporation was not filed until January 21, 1946. [R. p. 100.] On April 1, 1946, there was a final adjustment between the brothers, and proper balances struck. At the time, the corporation's books were set up and it took over the business.

(43) Mr. Asimow testified [R. pp. 99-106, 108-110, 113-114] concerning the "sharing of profits" for the pre-incorporation and pretransfer period, as follows:

Q. Now, prior to the incorporation of the corporation do you know whether or not there was any understanding between Max Kaufman, Morris Kaufman and Joseph Kaufman as to their relationship in that business? A. At the time they first discussed the corporation in November of 1945, they agreed that as soon as the charter came through, why, they would consider themselves all members of the same business.

Q. They agreed to what? A. They would consider themselves as partners, *as members of the business*. I was advised that the corporation charter had been issued January 22nd, and I was instructed to begin drawing up corporation books, *but I didn't have the time necessary to do it so I suggested that*

*they work out the same basis, the corporate basis and use that as a distribution of the profits for the three months, so there would be no misunderstanding between the three of them as to who was to share in the profits the first three months while I was preparing the records.* [R. pp. 100-101.]

Q. When were the corporate books set up? A. I was requested to set them up February 1st, but I did not set them up until April 1st.

The Court: When did the corporation take over the business?

The Witness: It would be April 1st. [R. p. 99.]

The Court: In the incorporation how were the shares divided?

The Witness: 40 per cent to Max Kaufman and 30 per cent to Joseph Kaufman and 30 per cent to Morris Kaufman.

The Court: *And the corporation took over the individual business of Max Kaufman as of April 1st?*

The Witness: *Yes, sir.*

The Court: And your report of earnings have been based on that?

The Witness: *Yes, sir.*

The Court: *All your accounting has been based on that?*

The Witness: *Yes, your Honor . . .* [R. p. 100.]

Q. Now, drawing your attention, Mr. Asimow, to the period between approximately the 3rd of January, 1946, and approximately, I believe, the 2nd of April 1946, can you state what the profits of Max Kaufman during that period were?

The Court: You are asking of the *individual or the business?*

Mr. Mellinkoff: Well, *both*, if your Honor please.  
A. The profit of the business for January 1st to March 31st, before any allocation between the respective parties, was \$9,295.47.

The Court: That was for the entire business?

The Witness: Retail and wholesale.

The Court: What was the wholesale?

The Witness: At the time the business was *in a confused state as to the corporation* and we made no distinction between the two departments. In other words, records were not kept between the two departments. They were all grouped under one heading, but we estimate that the profit of the retail might be \$2,000 and the profit of the wholesale would be \$7,263. That is subject to inspection and correction. That is just a guess on my part *based on prior operations*. [R. p. 102.]

The Court: Let me ask you this. When this money was put into the company *did they then act as co-owners of the business* until the corporation actually took it over—until you closed the books of the business and set them up in the name of the corporation?

The Witness: *They acted in a rather managerial capacity*.

The Court: But their interest in the business was the same as in the corporation?

The Witness: That is right.

The Court: So that it was *in a sense*, until the corporation went into effect, a *partnership*?

The Witness: It was an *unofficial partnership*. It was an *interim status until the corporation could be effected*.

Mr. McCall: I object to the witness' answer as *not being qualified to answer that question* and I

would like to develop some facts so your Honor will understand what the situation was by asking this witness . . .

Mr. Mellinkoff: May it please the court, I do not think anyone is better qualified than this witness to state what the practical operation of the business was.

The Court: May I ask, was this \$9,000 distributed or was it simply kept in the business?

The Witness: *It was kept in the business and was used in valuing the assets for the corporation. It was a definite factor in the transfer of the assets to the corporation.*

The Court: I know, but your statement makes it *more confusing than ever*. Those other parties invested money in the business with the understanding that it would be incorporated and the two brothers were to get a 30 per cent interest each?

The Witness: Correct.

The Court: 30 per cent of the stock, and that money went into the business before they were actually incorporated and before the corporation took over the business.

The Witness: That is right.

The Court: In the meantime, *did the other two men draw salaries?*

The Witness: *They drew salaries, yes. They were working for—well, they were connected with the business.*

The Court: When there was \$9,200 approximately, in excess of their salaries in the business?

The Witness: That is right.

The Court: And that continued as a part of the assets of the corporation when you set up the books?

The Witness: No; there was a cut-off date on April 1st, and we valued Max Kaufman's assets by a physical inventory, assigning values to them and transferred them to the corporation and he put high values on certain items and we were to take this \$9,000 into consideration in evaluating those assets by that sum so that they would arrive at a fair settlement between themselves.

They felt that the corporation should be organized when the charter was issued and the business was very profitable for the first three months and they felt they would be cheated unless they had some basis for sharing in those profits. At that time they considered themselves members of the business. At the time it was just a matter of formality that the corporation was not started until April 1st.

Q. By Mr. Mellinkoff: Mr. Asimow, I ask you this: Is there any further deduction or correction of this gross of \$9,000 that you as an accountant feel should be made here? A. I feel there should be a reasonable allowance for Max Kaufman's salary, to be arrived at by mutual understanding.

Q. Anything else? A. And the share allocated to the two participants in the corporation. [R. pp. 104-106.]

Q. Did you state to me a moment ago that this additional capital was not needed for the business but was needed to acquire that property? A. That is correct.

Q. That was what the capital was for? A. In anticipation of the corporation's requirements, building requirements.

The Court: A building to be used for the housing of the business?

The Witness: That is right.

The Court: And was the building in the name of the corporation?

The Witness: Yes. It went into escrow, I think, in November in the name of the corporation even before its actual charter issuance.

Q. By Mr. McCall: Then the property of the business was actually transferred as of April 1st—*inventory was taken at that time?* A. *That is right.*

Q. *And transfer made?* A. *That is right.*

The Court: That was set up at the time for accounting purposes?

The Witness: Accounting purposes, yes.

Q. By Mr. McCall: Well, what about the papers—any papers on the matter—that is, when they were signed? A. The papers? As a matter of fact I believe the papers were signed before that time but Mr. Mellinkoff would be in a position to tell you that. I wasn't present when the papers were signed.

Q. What papers do you mean? A. You said papers.

Q. I mean the papers under which the stock of goods in this store—name and goodwill and whatever else went with it that was transferred to the corporation? A. The stock was issued I think at that time, and we made preliminary notes on it. There was a settlement between the parties as to the respective interests.

Q. Up until that time, however, the store actually was the *sole business of Max Kaufman, wasn't it?* A. *It was the sole business of Max Kaufman* with the understanding, of course, that these other parties were to participate in the profits.

Q. 'Parties participate in the profits'? You mean that they were to acquire that store when the transfer was made. A. *Well, they were to use the profits*



*that had been made—that is, their percentage of the profits as a definite asset in their name.*

The Court: *Contribution?*

The Witness: Contribution.

Q. By Mr. McCall: On this item of the papers to which you are referring, where you read off the three months' profit was \$9,295.47, an item appears of salary, \$6,097.30. Does that include the salaries paid to Morris and Joseph Kaufman? A. Yes. . . . [R. pp. 108-110.]

Q. *These two men at that time were drawing salaries instead of shares?* A. *That is right.* [R. p. 110.]

Q. By Mr. McCall: Mr. Asimow, do you know whether or not Max Kaufman drew weekly checks from the business? A. He probably did but they were charged against his drawing account and never charged against the profits of the business.

Q. What do you mean? Do you show on any of these figures his drawing account? A. Well, we have it in the balance sheet, showing his net withdrawals from capital, but *the drawing of a private individual is never charged against the profit of a business.*

Q. You mean the amount that he might have drawn weekly or otherwise would not appear on this statement? A. No, sir, not until it was incorporated and he became an employee of the corporation. Then it became an officer's salary.

Q. Do you know how much he drew during that period? A. He drew out amounts—sometimes he would draw an even amount—sometimes draw \$1,000. *It had no relation to the business whatever. He drew what he wanted or needed.*

Q. *Was that true during this three months' period?* A. *Yes. He was still operating in the manner of an individual and drew accordingly, and paid his income tax on his drawings. Of course, now that it is a corporation he restricts himself to personal payments out of his own personal account. . . .* [R. pp. 113-114.]

Q. You don't know whether *Joe Kaufman* was drawing any salary out of the business from January 1st on through or not, do you? A. He drew a salary. I don't know whether it started January 1st, but *I believe he drew a salary starting in February.* Now, I am not certain of the exact date of that, but I do not know he drew a salary in March and probably a good part of February. I am not sure if he drew any in January. I think he was back east at the time. . . . [R. p. 114.]

(44) There is nothing in the testimony of any other witness substantially affecting or varying this testimony of Mr. Asimow. Compare the testimony of Max Kaufman [R. pp. 121-122, 132-133], Joseph Kaufman [R. pp. 135-139] and Morris Kaufman [R. pp. 140-141].

(45) The net effect of this testimony is: The Kaufman brothers in December planned to form a corporation, in which they were to become stockholders in certain percentages; the corporation to provide a building therefor, and then to take over Max Kaufman's existing business, and inaugurate a sausage manufacturing business in connection with it; the project to be financed out of the sale of Joseph Kaufman's business in Chicago, from which he promised to raise "all the money necessary." A building site was selected, and temporarily secured, and Joseph

Kaufman went back to Chicago to raise the balance of the money, Max Kaufman meantime retaining and operating his business as sole owner. When the veteran applied for reemployment, Joseph Kaufman was expected back in about two weeks, and they then expected to incorporate and take over the business. However, he did not return until February 7, 1946, and the remaining finances were not made available until some time later. A charter for the corporation was secured on January 21, 1946, but organization of the company and taking over the business still awaited Joseph and the balance of the money. Until then, no inventory was made, and the accountant *could not* adjust their interests or set up the company's books. On his return, Joseph and Morris were both employed by Max Kaufman in the business; they drawing salaries, but he not, because he still owned the business. On April 1, 1946, an inventory of Max's business was taken in preparation for the transfer to the company. This showed some high valuations, and upon the insistence of Joseph and Morris that their contributions to the capital should be adjusted accordingly, since some of their money had been tied up and the company charter had been secured some time before, an adjustment was made in which they were credited with 30% each of this profit toward their cash contributions.

(46) There was *no evidence* whatever that the Kaufman brothers ever "agreed to carry on as co-owners a business for profit," i. e., as partners; and none that they ever, in fact, carried on the business "as co-owners." In fact, it is affirmed by the appellees' own witnesses that the Kaufman brothers never operated as co-owners. [See

testimony of Asimow, par. 43, *supra*, and R. pp. 102, 104-105, 113-114, 132-133, 138-139.]

(47) A few days after April 1, 1946, the veteran was raised to \$55 per week for about ten days or two weeks [R. p. 66], and at the end of that time he earnestly protested his continued employment as "handy boy" at the low rate of pay; and was sent on a paid vacation. [R. pp. 46, 67.] On his return he was "discharged" for complaining, or failing to buy some stock in the company. [R. pp. 68-70.]

**C. The Appellee Corporation Is Merely an Incorporated Continuance of Max Kaufman's Business, Under the Same Management; and It Succeeded to Max Kaufman's Re-employment Obligation to the Veteran.**

(48) The business is still run by Max Kaufman, as president, who owns 40% of the company's stock. [R. pp. 132-133, 121, 100, 105.] The company merely took over and operated Kaufman's business as a going concern. [R. pp. 104-105, 108-110.]

**D. There Is No Substantial Conflict in the Evidence as to Any Material Fact.**

(49) The only conflicts in testimony arose on collateral matters; not on any *material facts*. All such collateral conflicts were injected into the case by Max Kaufman. He was contradicted on these points by nearly every witness who took the stand, *his own witnesses included*. These contradictions demonstrate the unreliability of his testimony. Thus—

(a) His testimony that Gimpelson wrangled with his brother Morris Kaufman and threatened to knife him

[R. pp. 123-124, 126-127] was *contradicted* by *Morris Kaufman himself* [R. pp. 141-142], as well as by the veteran. [R. p. 67.]

(b) His denial that he told the disinterested investigator for Dun & Bradstreet on March 30, 1946, that he was then the *sole owner* of the business [R. p. 131], was directly contradicted by the investigator, testifying from his written report of the conversation made at the time [R. pp. 143-145]; and by evidence *aliunde* it was shown that what Kaufman manifestly stated to the investigator was precise truth, as corroborated by his own accountant. [R. pp. 104-106, 108-110.]

(c) His testimony that the departure of Joe Arou, a salesman, for military service, had something to do with the profit-sharing agreement he made with Gimpelson [R. p. 118] in March, 1942, is contradicted by Kaufman's nephew Harry Silverman, who says that he (Silverman) returned from service and took Arou's place when Arou left for service in *November, 1941* [R. pp. 80, 82-83], four months before the profit-sharing agreement was made. [R. pp. 38, 60, 119.]

(d) To cast gratuitous, vituperous aspersions on Gimpelson's qualifications, experience and character, [R. pp. 126, 128-129], Max Kaufman undertook to repudiate *his own signed letter of recommendation of the veteran given in 1944*. [R. pp. 129-130, 20.]

(e) His testimony that he paid Gimpelson \$25 per week in cash, allegedly "out of his own pocket," upon the veteran's return from service [R. p. 123] is not only not otherwise corroborated in any manner, but is flatly and unqualifiedly denied by the veteran. [R. p. 64.]

(50) Kaufman's testimony, even if it had presented any real contradiction of a material fact, could scarcely be said to raise a substantial conflict in the evidence. There was no conflict between and among Gimpelson, Asimow, and Joseph or Morris Kaufman.

**E. The District Court Was Possibly Influenced by the Fact That He Considered This Suit a "Family Row."**

(51) The District Court was impatient with appellant's efforts to cross-examine Max Kaufman adequately [R. pp. 126-132], since the Court considered the suit a "family row" in which "there is not too much truth coming from the lips of any of the parties." [R. p. 130.] This abruptness was continued during argument of the case. [R. pp. 154-155.] It was not strictly speaking a "family row," since Gimpelson was not related to Joseph or Morris Kaufman, and only distantly to Max Kaufman. (Facts, par. 1, *supra*.) The Kaufmans had no "row" among themselves.

(52) During the trial, the Court urged both sides to compromise their differences [R. pp. 86-90], but their efforts failed. [R. p. 91.] This failure, and the relation-by-marriage between Max Kaufman and the veteran (par. 1, *supra*) may have influenced the Court in deciding the case. [R. pp. 21, 25.] This was unjustified. See 162 F. (2d) 1011.

*The foregoing summary covers and cites all the evidence in the case, upon any material or controversial point.*

## ARGUMENT.

**Point I: The Veteran Also “Shared the Profits” With Max Kaufman, but Was No “Partner.” He Left a Position “Other Than Temporary” in Kaufman’s “Employ,” and Made Due “Application for Reemployment” Under the Act. He Did Not Waive His Reemployment Rights, and Was Not Guilty of Laches.**

(A) The Veteran’s Position as a Manager Sharing the Profits Was That of an “Employee” of Kaufman, and Not that of a “Co-owner” or “Partner”; and Was “Other Than Temporary.”

“Co-ownership” is essential to partnership. One not associated as “co-owner” is not a partner, although he shares the profits. *California Civil Code, Secs. 2400, 2401(1, 4d) and 2410; Uniform Partnership Law, Secs. 6, 7, 16.*

A manager sharing the profits as wages holds a “position in the employ” of his employer and is covered by the reemployment provisions. *50 U. S. C. A. App., Sec. 308(b); Williams v. Dodds* (9 C. C. A., No. 11,526, Sept. 22, 1947), affirming *Dodds v. Williams* (D. C., Ariz., 1946), 68 Fed. Supp. 995; *Anderson v. Schouweiler* (D. C., Idaho, 1945), 63 Fed. Supp. 802; *Salter v. Becker Roofing Co.* (D. C., Ala., 1946), 65 Fed. Supp. 633.

The coverage of the Act is to be liberally construed in favor of veterans, not strictly construed against them. *Fishgold v. Sullivan Corp.* (1946), 328 U. S. 275, 285; *Kay v. General Cable Corp.* (3 C. C. A., 1944), 144 F. (2d) 653; *MacMillan v. Montecito Country Club* (D. C., So. Cal., 1946), 65 Fed. Supp. 240; *Lee v. Remington*

*Rand, Inc.* (D. C., So. Cal., 1946), 68 Fed. Supp. 837; *Karas v. Klein* (D. C., Minn., 1947), 70 Fed. Supp. 469.

This veteran's position, and his profit sharing agreement with Max Kaufman, were "for an indefinite future period," and were "other than temporary" under the Act. See The Facts, pars. 11-15, *supra*, and R. pp. 58-60, 91-93, 119. 50 U. S. C. A. App., Sec. 308(b)(B); *Opinions of the Attorney General, Vol. 40, No. 106* (May 30, 1945), modifying 40 Op. A. G., No. 66; *Trusteed Funds, Inc., v. Dacey* (1 C. C. A., 1947), 160 F. (2d) 413; *Daniels v. Barfield* (D. C., Pa., 1947), 71 Fed. Supp. 884, 886; *David v. B. & Maine R. Co.* (D. C., N. H., 1947), 71 Fed. Supp. 342, 345.

**(B) The Veteran Was Not Required, in "Applying for Re-employment," to Apply for Any Particular Position, to Be Entitled to Be Restored to His Former "Position, or to a Position of Like Seniority, Status and Pay" Under the Act. Nevertheless, He Did So.**

Upon a qualified veteran's making timely "application for reemployment," it becomes his employer's *affirmative duty*, under Section 8(b)(B) of the Selective Training and Service Act, to "*restore*" him to *certain positions delimited by law, i. e., to his former "position or to a position of like seniority, status and pay."* So any "application for reemployment" is *prima facie* and *per se* an application for restoration compatible with law, *i. e.*, to the position or positions specified in the law. It is immaterial that the veteran does not apply for a *particular job by name*. The terms of the law complete the application if such omission is a defect. The employer is clearly not discharged of his legal duty thereby.



Furthermore, when a vetera! has actually applied in time for reemployment, and has been offered an inferior job with an explanation why his former job is not offered, it is unfair and unreasonable to say that he did not make due application for proper restoration. 50 U. S. C. A. App., Sec. 308(b)(B); Handbook—Veterans Assistance Program, Sec. 301.8. Cf. *Grasso v. Crowhurst* (3 C. C. A., 1946), 154 F. (2d) 208; *Salter v. Becker Roofing Co.*, *supra*; *Levine v. Berman* (7 C. C. A., 1947), 161 F. (2d) 386; *David v. Boston & Maine R. Co.* (D. C., N. H., 1947), 71 Fed. Supp. 342.

Gimpelson did apply for his former, or a like, position on December 10, 1945. The conversation of that date, as related by both the veteran and Max Kaufman, demonstrate that *each understood that he was then applying for reemployment, and in his former position, if possible*. The conversation was composed primarily of explanations and excuses by Kaufman as to why it was “impossible” for him to restore him to his former job, and why he was offered a lesser job. See The Facts, par. 22(a-h) and 23, *supra*; and R. pp. 41-49, 65-72, 122-123. *These explanations and excuses speak for themselves as to what the parties had in mind*.

The veteran clearly made all the application necessary under the law on December 10, 1945, to entitle him to proper restoration, whether or not the manager’s job was then expressly mentioned.

(C) The Veteran Did Not Waive His Right to Proper Restoration.

Waiver is the voluntary relinquishment of a known right which is at the time available. One cannot waive a right before he is in a position to assert it. 67 C. J. 299, *Waiver*, Sec. 4. And, a waiver must be supported by a consideration, or by estoppel *in pais*, pleaded and proved. 67 C. J. 289-314, esp. *Waiver*, Secs. 1-7, 9-11; *Atlantic Coast Line R. Co. v. Bryan* (1909), 109 Va. 523, 65 S. E. 30, 32; *Dougherty v. Thomas* (1933), 313 Pa. 287, 169 Atl. 219, 223; *Decker v. Sexton* (1896), 43 N. Y. S. 167, 171; *Universal Gas Co. v. Cent. Ill. P. S. Co.* (7 C. C. A., 1939), 102 F. (2d) 164, 169; *Aetna L. Ins. Co. v. Kepler* (8 C. C. A., 1941), 116 F. (2d) 1.

The doctrine of waiver is inapplicable here for at least two reasons: (1) The veteran did not "voluntarily relinquish" his right to restoration as manager or a like position, because no such job was ever offered, or made "available," to him. There could be no "voluntary" election on his part, and consequently no waiver. (2) There is no "consideration" for the alleged waiver, and the appellees' position of refusing him restoration as manager never changed to their prejudice, so there is no "estoppel *in pais*" to support any waiver.

Max Kaufman testified: "I explained to him every bit of it"; and told him "I don't own this any more. It is a corporation." And said to him: "Jack, they are going to allow you only \$40 from the business—the business belongs already to the corporation. . . . I want you to be satisfied and then we will build up the new plan. We

will probably be able to give you a job that will fit you better in it.” [R. pp. 122-123.] This was a misstatement of fact, and Kaufman knew it. See The Facts, par. 28, *supra*, and R. pp. 143-145. The corporation did not own the business, and Kaufman was the sole owner. See The Facts, pars. 42-46, *supra*; and R. pp. 99-106, 108-110, 113-114, 121-122, 132-133, 135-141.

The appellees’ contention is that Kaufman secured two advantages, *by means of this misstatement*: (a) he avoided (*i. e.*, rejected) Gimpelson’s application for restoration, and (b) secured his temporary acquiescence in inferior work, thus allegedly effecting a “waiver.” But a waiver so induced lacks both mutuality and consideration, being based on a misstatement.

The veteran’s version is different. He says he was led to acquiesce in a short delay and to accept inferior interim work, not by Kaufman’s self-asserted misrepresentation about the ownership of the business, but by *Kaufman’s request* that the veteran do so pending Joseph Kaufman’s return “in about two weeks,” and his promise that he would be “taken care of” at that time. [R. pp. 41-45, 71-75.] The veteran protested against the inferior work and wages from the first week. See The Facts, par. 22 (d, e, g, h), *supra*; and R. pp. 45-49, 65-72. He was never “taken care of.” The promise of a better job was broken and the veteran was fired from the inferior job. See The Facts, par. 22(d, e, f) and 47, *supra*.

Regardless of whether credence be placed in Kaufman’s or Gimpelson’s version of the conversation, *neither helps Kaufman*. The veteran’s action was clearly induced either (1) by Kaufman’s misstatement of fact, or (2) by his

broken promise; and the "consideration" was thus either always non-existent, or has failed.

Estoppel, based on delay induced by the party claiming estoppel, cannot be sustained as shown under "laches" below.

**(D) The Veteran Was Not Guilty of Laches.**

The parties stipulated that the veteran was not guilty of laches in filing suit. [R. p. 77.] Nor was he guilty of laches before that time.

The doctrine of laches is based on estoppel, and the maxim of unclean hands. It is an affirmative, equitable defense. Mere lapse of time does not constitute laches. In addition to lapse of time, the party asserting laches must show that the delay was *not induced by any act of his*; and that, because of the other party's inexcusable delay, *his position has so changed* as to make it inequitable for the other to have relief. 30 *Corpus Juris Secundum* 531-537, *Equity*, Sec. 116; 2 *Cyc. of Fed. Proc.* (1928) 506-514, Sec. 412; 5 *Cyc. of Fed. Proc.* (2d 1943) 52 *et seq.*, Secs. 1519-1520, 1526, 1527; *Smetherham v. Laundry Workers Union* (1941), 44 Cal. App. (2d) 131, 111 P. (2d) 948, 952-953; *Winn v. Shugart* (9 C. C. A., 1940), 112 F. (2d) 617, 623.

As Kaufman induced the veteran's delay, he cannot claim laches or estoppel.

Point II: The Issue of Partnership Vel Non Is Immaterial; Since in Any Event the "Incoming Partners" Were Bound by Max Kaufman's Obligation to the Veteran. Nevertheless, the Kaufman Brothers Never Were Partners, Either Actual or Constructive, Although on April 1, 1946, They Divided Max Kaufman's Profits for Three Months. Until That Date, He Was the Sole Owner of His Meat Business. He Was Immediately Succeeded as Such Owner by the Corporation, in Which His Brothers Were Theretofore Mere Subscribers for Stock. It Was Never "Impossible or Unreasonable" for Him to Properly Restore the Veteran.

(A) The "Partnership," If It Existed, Was Bound by Max Kaufman's Obligation to the Veteran, in the Interval Prior to April 1, 1946.

The Uniform Partnership Law, Sec. 17 (*California Civil Code, Sec. 2411*) provides that "a person admitted as a partner into an existing partnership is liable for *all the obligations*" arising before his admission, "as though he had been a partner when such obligations were incurred"; but that his liability shall be satisfied only out of the partnership property. The same Code defines an "*obligation*" as "*a legal duty, by which a person is bound to do or not to do a certain thing,*" and that it may arise by operation of law, and be enforced in the manner provided by law. *California Civil Code, Secs. 1427 and 1428.*

Sec. 2411 of the Civil Code of California is applicable when the sole owner of a business takes in a partner, as well as when there is a change in the personnel of an existing partnership. See *Commissioner's Notes to Secs. 17 and 41, U. L. A., Partnership; Note: 45 A. L. R. 1257,*

*Sec. II(c); Wine Packing Corp. v. Voss* (1940), 37 Cal. App. (2d) 528, 100 P. (2d) 325; *Kennedy & Shaw Lbr. Co. v. Taylor* (1892), 3 Cal. Unrep. Cas. 697, 31 Pac. 1122.

A former employee, absent in military service, is deemed to be on a "furlough or leave of absence." 50 U. S. C. A. App., Sec. 308(c). He still remains for many purposes, an "employee" of the employer, in contemplation of law. *In re Walker's Estate* (1944), 53 N. Y. S. (2d) 106; *Thompson's Estate* (1925), 213 N. Y. S. 426, 126 Misc. 91; *Hovey v. Grier* (1929), 324 Mo. 634, 23 S. W. (2d) 1058. The necessity of properly reemploying him upon his possible return is a continuing *conditional duty or obligation* of the employer during his absence in the armed forces.

In California, a partnership is not a legal entity separate from the partners composing it. *Jung v. Bowles* (9 C. C. A., 1946), 152 F. (2d) 726; *Stilgenbauer v. U. S.* (9 C. C. A., 1940), 115 F. (2d) 283. The owner of a business who takes in a partner, does not shed his existing obligations or duties by so doing; and, under Civil Code, Sec. 2411, *supra*, the incoming partner becomes bound with him, to the extent of the partnership assets.

Therefore, it is immaterial whether, or when, the Kaufman brothers became "partners," in so far as the veteran's reemployment rights are concerned. The taking in of the two "partners" by Kaufman did not render restoration "impossible or unreasonable" for all "partners" were obligated—if they were "partners," as found by the Court.

(B) The Kaufman Brothers Were Mere Pre-incorporation Subscribers for Stock in a Corporation to Be Formed in Future. They Never Were "Co-owners" or "Partners" in Max Kaufman's business, Either Actual or Constructive, at Any Time.

It is not necessary that a subscription for stock in a corporation be in writing, if a part of the price has been paid. *California Code of Civil Procedure, Sec. 1973a(1)*; *18 C. J. S. 780, Corporations, Sec. 294(c)(1)*; *Vermont Marble Co. v. Declez Granite Co.* (1902), 135 Cal. 579, 67 Pac. 105; *Note, 14 A. L. R. 394.*

A pre-incorporation stock subscription is valid in California if the proposed corporation is incorporated within 90 days afterward, and an application for a permit to issue the shares subscribed for is made with reasonable diligence after such incorporation, and the permit is issued. *California Corporate Securities Act, Stats. 1917, p. 673 et seq., as amended (Deering's General Laws, Act 3814), Secs. 2(8), 3, 16 and 33.*

Corporate existence begins in California when the articles of incorporation are filed in the office of the Secretary of State. But, the corporation is not then ready for business. If it is a stock corporation, it must issue stock, and this can be done only under a permit from the state corporation commissioner, upon an application filed by its officers, who must first be elected by the directors appointed in the articles. Under such permit, when issued, the company may accept assets constituting its capital, and proceed then to transact business, not before. *Cal. Corp. Securities Act, Secs. 2(8), 3, 16 and 33, supra; Civil Code of California, Secs. 285-293, 308, 326-329; 6-A Cal. Jur. 165-166, Corporations, Secs. 73 and 75.*

No partnership exists between stockholders in a corporation or between them and the directors, *20 Cal. Jur. 699, Partnership, Sec. 17*; and they cannot claim to be partners, *14 C. J. 69, n. 50, Corporation, Sec. 35; 18 C. J. S. 390, n. 28, Corporations, Sec. 11*.

No partnership, either express or implied, exists between the *pre-incorporation subscribers to the stock of a proposed corporation* to be formed to take over a business, although they may have *paid in* the amounts of their subscriptions to the owner of the business and have *shared his profits* therefrom. They do not become "co-owners" or "partners" under such facts. *Drennan v. London Assurance Corp.* (1884), 113 U. S. 51, 57-58, 28 L. Ed. 919, 923; *London Assur. Corp. v. Drennan* (1886), 116 U. S. 461, 469, 29 L. Ed. 689, 690; *Lindley on Partnership* (10th Ed., 1935) 19-21; *20 Cal. Jur. 699, n. 8, 9; Blanchard v. Kaull* (1872), 44 Cal. 440, 451; *Fourchy v. Ellis* (C. C., Vt., 1905), 140 Fed. 149; *Baker v. Bates-Street Shirt Co.* (1 C. C. A., 1925), 6 F. (2d) 854; *Kinney v. Bank of Plymouth* (1931), 213 Iowa 267, 236 N. W. 31.

"Co-ownership," not profit sharing, is the test of partnership. Without co-ownership, or community of interest, no partnership can exist. Co-ownership means the "power of ultimate control" over the business. "To state that partners are co-owners of a business is to state that *they each have the power of ultimate control*." *Commissioner's Note to Sec. 6 of the Uniform Partnership Law* (U.L.A., Partnership, Sec. 6); *Drennan v. London Assurance Corp.*, 113 U. S. 51 and 116 U. S. 469.

Although they may share the profits of a business, persons not associated as co-owners are not partners,



either general or limited, express or implied, *among themselves or as to third persons*. *Uniform Partnership Law*, Secs. 6(1), 7(1) and 16(1-2); *California Civil Code*, Secs. 2400(1), 2401(1) and 2410 (1-2), 2477, 2478, 2483 and 2486; *In re Mission Farms Dairy* (9 C. C. A., 1932), 56 F. (2d) 346; *Kasch v. Commissioner* (5 C. C. A., 1933), 63 F. (2d) 466, cert. den. 290 U. S. 644, 78 L. Ed. 559; *Sugg v. Hopkins* (5 C. C. A., 1926), 11 F. (2d) 517; *Williams v. Wolf* (1 C. C. A., 1924), 297 Fed. 696, cert. den. 44 S. Ct. 638, 265 U. S. 593, 68 L. Ed. 1197; *In re Fechheimer Fishel Co.* (2 C. C. A., 1914), 212 Fed. 357, 367; *Giles v. Vette* (1923), 263 U. S. 553, 559, 44 S. Ct. 157, 159, 68 L. Ed. 441; *Drennen v. London Assurance Co. and London Assurance Corp. v. Drennan*, *supra*; *Meehan v. Valentine* (1892), 145 U. S. 611, 12 Sup. Ct. 972, 38 L. Ed. 835, and note; *Kersch v. Taber* (1945), 67 Cal. App. (2d) 499, 154 P. (2d) 934; *Moon v. Ervin* (1943), 64 Idaho 464, 133 P. (2d) 933; *Wallace v. Pacific Electric R. Co.* (1930), 105 Cal. App. 664, 288 Pac. 834; *Smith v. Grove* (1942), 47 Cal. App. (2d) 456, 118 P. (2d) 324.

“A partnership is an association of two or more persons to carry on *as co-owners* a business for profit”; and “Persons who are not partners as to each other are *not* partners as to third persons.” *Cal. Civil Code*, Secs. 2400(1), 2401(1) and 2410, and cases just above cited.

Therefore, in this case, there was not, and could not, be any such thing as an “unofficial partnership,” or an “interim status” resembling a partnership, or “in a sense of partnership,” or “in legal effect created a partnership,” in the sense in which those expressions were used

by a witness, and the District Court. [R. pp. 21, 104, 109.] There either was, or was not, a general partnership between the Kaufman brothers. As there is no proof that any agreement ever existed between them to "carry on the business as co-owners," *they were never partners.*

The witness Asimow repeatedly said that the Kaufmans were not "co-owners," that it was Max Kaufman's "sole business," run by him "as an individual" continuously to April 1, 1946. There is no proof to the contrary. [See The Facts, Par. 43-46, *supra*; and R. pp. 100-101, 104-106, 109-110, 113-114.]

The Kaufman's were not limited partners, for no articles of limited partnership were ever drafted. *Calif. Civil Code, Secs. 2477, 2478 and 2483.*

Morris and Joseph Kaufman "worked for" Max Kaufman prior to April 1, 1946, and "drew salaries rather than shares." [R. pp. 105, 110.] Max Kaufman, however, drew "what he wanted or needed" and "was still operating in the manner of an individual." [R. p. 113.] This is the appellees' evidence.

There was no "profit sharing," in the "partnership" or "co-ownership" sense. Max Kaufman merely agreed to divide his quarterly profit because of the delay in organizing the company for business, and because of the unexpected size of his inventory on April 1, 1946, and in view of the fact that his brothers funds had been tied up in the reorganization plan. [R. pp. 99-101, 105-106, 109-110.]

Such "profit sharing" comes within the exceptions stated in *Calif. Civil Code, Sec. 2401(2, 4d)*, that no inference of partnership arises from profit sharing "as interest on a loan, though the amount of payment varies with the profits of the business." (See *London Assur. Corp. v. Drennan*, and other cases, *supra*.) In no event did such profit sharing evidence "co-ownership," which was essential to "partnership."

(C) Max Kaufman Remained the Sole Owner of His Business Until April 1, and It Was Never "Impossible or Unreasonable" for Him to Restore the Veteran.

"Unreasonable" means more than inconvenient, undesirable or more expensive. *Kay v. General Cable Corp.* (3 C. C. A., 1944), 144 F. (2d) 653, 655; *Levine v. Berman* (7 C. C. A., 1947), 161 F. (2d) 386; *Van Doren v. Van Doren Laundry Service* (3 C. C. A., 1947), 162 F. (2d) 1007.

As the sole owner of his business, Kaufman could have restored the veteran; and there is no proof that such restoration would have blocked or interrupted the incorporation plan. We may assume it would have been inconvenient, or less desirable to Kaufman, than the plan followed, and that some of the corporation's promoters would have enjoyed some less profit than they did in the next year, out of the reorganization plan. But it was clearly not "impossible."

Nor was it "unreasonable," when the national policy and interest, and the fighting man's hardships, and need for prompt civilian restoration are considered. It was clearly no more of a hardship for the Kaufmans to forego some of their anticipated profits and provide this veteran with proper work for a year, than it was for him to be jerked out of his job and be thrown into the hostilities in the Pacific for three years.

We were all in the war together—or were we?

The Act here invoked was passed to *equalize the hardships* of military service. They were to be "shared generally." 50 U. S. C. A. App. 301(b); *Kay v. General Cable Corp.*, *supra*. Not heaped endlessly on the nation's warriors.

That it would have cost the Kaufmans this veteran's proper wage for a year did not make his restoration by them "unreasonable" under the facts here.

**Point III: There Was No Outright Sale of Kaufman's Business. The Corporation Is a Mere Re-arrangement, Merger and Expansion Thereof. The Company Took Over the Business, Under Kaufman, With No Change in Policies or Business, and With Full Knowledge of the Veteran's Rights: and It Is Bound to as the "Employer" Under the Reemployment Provisions.**

This case differs from *McFadden v. Dienelt* (D. C., Calif., 1946), 68 F. Supp. 951, where the business was sold outright to third persons during the veteran's military absence. Here, during the veteran's reemployment year, *after his return*, the employer merely merged his business into a corporation, formed between himself and third persons, all of whom had full knowledge of the veteran's rights.

As partners, all of them would have been obligated to the veteran. See Argument, Point II(A) *supra*. Did the mere fact that they chose to incorporate, rather than become partners, change their obligation to him?

It has been held that mere merger or incorporation do not defeat a veteran's reemployment rights, and that the merged entity is responsible to him. *Trailmobile Co. v. Whirls* (6 C. C. A., 1946), 154 F. (2d) 866, and especially cases cited on page 871, reversed on other grounds 331 U. S. 40; *Sullivan v. Milner Hotel Co.* (D. C., Mich., 1946), 66 F. Supp. 607. See also *Brown v. Luster* (9 C. C. A., No. 11544, pending); *Karas v. Klein*, 70 F. Supp. 469. Under the National Labor Relations Act, this corporation would have been recognized as identical with Kaufman, and therefore the "employer" in contemplation of the Act. *N. L. R. B. v. Hearst* (9 C. C. A.), 102 F. (2d) 658, 663; *N. L. R. B. v. Federal Engineering Co.* (6 C. C. A.), 153 F. (2d) 233; *N. L. R. B. v. Adel Clay Products Co.* (8 C. C. A.), 134 F. (2d) 343,

346. It has been recognized that the reemployment provisions are akin to the National Labor Relations Act, in meaning and effect. *Bentubo v. Boston & Maine R. Co.* (1 C. C. A.), 160 F. (2d) 326, 328. If so, the corporation is obligated.

Furthermore, a veteran's reemployment rights cannot be adversely affected by *contracts* between the employer and third persons. *Fishgold v. Sullivan Corp.* (1946), 328 U. S. 275, 285; *Trailmobile Co. v. Whirls* (1947), 331 U. S. 40, 58-59.

The corporate fiction may be disregarded in this case, and the veteran's rights protected by an appropriate order. *N. L. R. B. v. Adel Clay Products Co.*, and other cases cited *supra*.

**Point IV: Reemployment of a Veteran Effects a Contract for a Year of Work; and an Employer Who Voluntarily Disenables Himself to Perform His Part of Such Obligation by a Sale of the Business During Such Year, Without Providing for Continued Employment of the Veteran by the Purchaser, May Be Held Liable for a Year of Wages to a Veteran Who Loses His Job as Result Thereof.**

Laws which subsist at the time and place of the making of a contract become a part thereof, as though set out therein; and an implied part of every contract of reemployment with a veteran is that he will not be discharged "without cause" for one year. *Northwest Steel R. Mills v. Commission* (9 C. C. A., 1940), 110 F. (2d) 286; *U. S. ex rel. v. Quincy* (1866), 4 Wall. 535, 550; *Farmers & M. Bank v. Fed. Reserve Bank*, 262 U. S. 649, 660; *Industrial Com. v. Aetna L. Ins. Co.* (1918), 64 Colo. 480, 174 Pac. 589, 3 A. L. R. 1336, 1343; *U. S. v. Dietrich* (C. C., Nebr., 1904), 126 Fed. 671, 675; 17 C. J. S. 782-785; 12 Am. Jur. 769-772.

“Cause for discharge” means some defect on the part of the employee. *Hoyer v. United Dressed Beef Co.* (D. C. Calif., 1946), 67 F. Supp. 730; *Corman Aircraft Corp. v. Weihmiller* (7 C. C. A., 1935), 78 F. (2d) 241, 100 A. L. R. 504; *Development Co. etc. v. King* (2 C. C. A., 1908), 161 Fed. 91, 24 L. R. A. (N. S.) 812; *Leatherberry v. Odell* (C. C., N. C., 1880), 7 Fed. 641.

One wrongfully discharged under such a contract may sue at once for a full year of wages. *Moore v. Illinois Cent. Ry. Co.* (5 C. C. A., 1943), 136 F. (2d) 412, cert. den. 320 U. S. 771, 64 S. Ct. 84, 86 L. ed. 461; *Reutschler v. Mo. Pac. R. Co.* (1934), 126 Nebr. 493, 253 N. W. 694, 95 A. L. R. 1, 9-10, and Note pp. 43-44; *Moore County Carbon Co. v. Whitten* (Tex. Civ. App. 1940), 140 S. W. (2d) 880, 882; *Levine v. Meisel* (1942), 34 N. Y. S. (2d) 561.

The sale of a business is a breach of a contract of employment for a definite term. 39 *Corp. Jur.* 76, Sec. 69, n. 12; 35 *Am. Jur.* 467-468, Sec. 32; Notes: 6 *L. R. A.* (N. S.), 63, 6 *Ann. Cas.* 236; *White v. Lumiere North American Co.*, 79 Vt. 206, 64 Atl. 1121, 6 *L. R. A.* (N. S.), 807; *Gaspar v. United Milk Producers, etc.* (1944), 62 Cal. App. (2d) 546, 144 P. (2d) 867, 871-2.

If the Kaufmans' corporation is not obligated to the veteran, then Max Kaufman individually should be required to respond for the veteran's loss of wages for a year.

**Point V: The Finding That the Monies From Kaufman's Two Brothers Trebled the Assets of His Business Is Unsupported by Proof; and if Material, Should Be Set Aside.**

There is no proof nor inference to support this finding complained of in Specification of Errors I(6) *supra*. [See Finding VIII, R. p. 24.]

For \$26,000, the two brothers acquired a 60% interest in a business which in three months earned \$9,295 profits over and above their salaries. Their collective split on this profit would be over \$5,550, or \$22,200 per annum, a return of 85% a year. Assuming 25% to be a reasonable return, Kaufman's business, as a going concern, would be worth \$148,000, based on the \$9,250 3-month profit. And, thus for \$26,000 his brothers got a 60% interest in the business, which at a \$148,000 valuation would be worth \$88,800. Apparently, they increased the assets *not more than 16%*, instead of the 200% claimed in this unsupported finding.

**Conclusion.**

The District Court was moved by what was inaccurately called a "family row," insoluble amicably. The "family," however, is the Kaufman brothers who have no disagreement among themselves. They are simply alligned in unison against a distant relation-by-marriage of one of them.

Even if there be kinship between a veteran and his employer, that is no reason for denying him reemployment rights. *Van Doren v. Van Doren Laundry Service, Inc.* (3 C. C. A., 1947), 162 F. (2d) 1007, 1011. Such

a veteran has nevertheless a right to re-enter his former calling and seek to re-establish himself therein, without humiliating and discriminatory demotion to servile service at the hands of a "kinsman."

The treatment accorded this veteran was surely not that expected from welcoming blood relatives. It was precisely the same as that expected from strangers, moved solely by cynical, calculating self-interest. The Kaufmans never tried to take care of this veteran. Their every effort was to the contrary.

There was enough profit in this business, under the proof, to provide the veteran with an adequate wage, and yet leave a more than ample return on the brothers' investment. The veteran was not selfish; he was willing to cooperate; he took a humiliating job at meagre pay under a promise, never fulfilled, that a proper job would be forthcoming, if he would do so.

By so cooperating, he did himself a double disservice. He wasted four months at unappreciated, scurrilous, underpaid work; and his very indulgence is now seized upon by his "grateful" accommodatee as a basis for claiming "waiver" and "laches."

If liberality is not to be extended by a court to a veteran in such a case, at least straight law should be applied, and not denied.

Timely application for reemployment was made, and there was no partnership. But even if there had been, the partnership would have been obligated to him under the reemployment provisions; and the corporation, as the partnership's successor, would also be obligated under the



*Adel Clay Products Co.* case, and others cited under Argument, Point III, *supra*. The Court found “a partnership,” but failed to carry such finding to its conclusion.

As there was no partnership, Max Kaufman was sole owner, and could, and should, have restored the veteran properly, but refused to do so. The corporation taking over his business later, with full knowledge of his obligation to the veteran, was likewise obligated; or, Kaufman should be held liable for a year’s loss of wages.

This case is more complicated than veteran’s suits usually are, but Gimpelson did not make it so. All he asked was work and pay, which the Congress promised during his three years at war.

Kaufman alone, or Kaufman and his brothers, could have accorded him proper reinstatement, beyond doubt. That they refused it for their own gain, at his expense, and have reaped and shared among themselves the benefit of the wage he would have made, is also a certainty.

The Congress did not intend that an employer might side-step his reemployment obligation to a veteran for mere financial gain or convenience. That is all that happened here.

We submit that numerous errors were made by the Court below. The case presents some legal points of real difficulty in the application of the reemployment provisions, which should receive careful and deliberate consideration. Viewing the situation as a “family row,” the court below based its decision on the mere “form” of application for reemployment and on the existence of an “implied partnership,” not on the basic problems of graver import discussed herein. [Cf. R. pp. 146-156, with R. pp. 21-25.]

The veteran made due application for reemployment; there was no partnership; and a full review on the facts is due him. That *some relief* should be granted him is respectfully submitted. The extent thereof depends on answers to some of the questions briefed above. The full relief prayed, against both appellees, is permissible; and is, we submit, equitably proper on the law and facts of this case.

Respectfully submitted,

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## APPENDIX.

### Abstract of Material Parts of Statutes Involved.

1. The Selective Training and Service Act of 1940, as Amended, Secs. 8 and 16(b) (50 U. S. C. A. App. Sec. 308 and 316(a).)

Sec. 8(a)—(Provides for the issuance of certificates of satisfactory completion of service to persons inducted into the armed forces.)

Sec. 8(b)—“In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—” . . .

“(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer’s circumstances have so changed as to make it impossible or unreasonable to do so;”

Sec. 8(c)—“Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the

employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.”

Sec. 8(d)—(Not applicable.)

Sec. 8(e)—“In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer’s unlawful action.”

Sec. 16(b)—(Excepts Sec. 8 from the expiration clause, and continues it in effect indefinitely.)

**2. The Service Extension Act of 1941, as Amended (50 U. S. C. A. App. Sec. 357).**

Sec. 7—“Any person who, subsequent to May 1, 1940, and prior to the termination of the authority conferred by section 2 of this joint resolution, shall have entered upon active military or naval service in the land or naval forces of the United States shall be entitled to all the reemployment benefits of section 8 of the Selective Training and Service Act of 1940, as amended.” . . .

3. Uniform Partnership Law, Secs. 6, 7, 16 and 17 (California Civil Code, Sections 2400, 2401, 2410, 2411, 1427 and 1428).

Sec. 2400. "*Partnership defined.* (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit."

Sec. 2401. "*Rules for determining the existence of a partnership.* In determining whether a partnership exists, these rules shall apply:

"(1) Except as provided by section 2410 persons who are not partners as to each other are not partners as to third persons.

"(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

"(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

"(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

"(a) As a debt by installments or otherwise.

"(b) As wages of an employee or rent to a landlord.

“(c) As an annuity to a widow or representative of a deceased partner.

“(d) As interest on a loan, though the amount of payment vary with the profits of the business.

“(e) As the consideration for the sale of the good will of a business or other property by installments or otherwise.”

Sec. 2410. *“Partner by estoppel.* (1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to anyone, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

“(a) When a partnership liability results, he is liable as though he were an actual member of the partnership.

“(b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

“(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation, a partnership act or obligation results; but in all



other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.”

Sec. 2411. “*Liability of incoming partner.* A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property.”

Sec. 1427. “*Obligation, what.* An obligation is a legal duty, by which a person is bound to do or not to do a certain thing.”

Sec. 1428. “(*How created and enforced.*) An obligation arises either from:

“One. The contract of the parties; or,

“Two. The operation of law. An obligation arising from operation of law may be enforced in the manner provided by law, or by civil action or proceeding.”

#### 4. Limited Partnership Law of California (California Civil Code, Secs. 2477, 2478 and 2483).

Sec. 2477. “*Limited partnership defined: (Liability of limited partners).* A limited partnership is a partnership formed by two or more persons under the provisions of section 2478, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligation of the partnership . . .”

Sec. 2478. “*Formation: (Certificates, execution and filing).* Two or more persons desiring to form a limited partnership shall

“(a) Sign and swear to certificates in duplicate, which shall state

“I. The name of the partnership.

“II. The character of the business.

“III. The location of the principal place of business.

“IV. The name and place of residence of each member; general and limited partners being respectively designated.

“V. The term for which the partnership is to exist.

“VI. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner.

“VII. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made.

“VIII. The time, if agreed upon, when the contribution of each limited partner is to be returned.

“IX. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution.

“X. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution.

“XI. The right, if given, of the partners to admit additional limited partners.

“XII. The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority.

“XIII. The right, if given, of the remaining general partner or partners to continue the business on

the death, retirement or insanity of a general partner, and

“XIV. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.

“(b) File one of said certificates in the clerk’s office and file the other for record in the office of the recorder of the county in which the principal place of business of the partnership is situated, in a book to be kept for that purpose open to public inspection, and if the partnership has places of business situated in different counties, a copy of the certificate, certified by the recorder in those office it is recorded, must be filed in the clerk’s office and recorded in like manner in the office of the recorder in each such county.

“(2) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph one of this section.”

Sec. 2483. *“Limited partner is not liable to creditors. A limited partner shall not become liable as a general partner, unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business.”*

5. California Corporation Law (California Civil Code, Secs. 285-293, 308, 326-329).

Secs. 285-289—(Authorize the incorporation and re-incorporation of corporations for any lawful purpose by three or more persons.)

Sec. 290—(Describes the data to be contained in the articles of incorporation, including):

. . . “6. The number of its directors not less than three; the names and addresses of the persons who are appointed to act as the first directors. The number so fixed shall constitute the authorized num-

ber of directors until changed by amendment of the articles or, unless the articles provide otherwise, by a by-law duly adopted by the shareholders."

Sec. 290a-291—(Require approval of the articles of certain corporations; and regulate the name selected for the company.)

Sec. 292—"*Execution and filing of articles.* Each person named therein as a director shall, and any other persons may, sign the articles. All signatures thereto shall be acknowledged before an officer authorized by the laws of the State or Government where the acknowledgment is made to take acknowledgments. Any certificate of acknowledgment taken without the State must be authenticated by the certificate of an officer having the requisite official knowledge of the qualifications of the officer before whom the acknowledgment was made, when taken before any officer other than a notary public or a judge or clerk of a court of record having an official seal.

"If the articles conform to law, the Secretary of State shall file them in his office and shall indorse the date of filing thereon. The corporate existence shall begin upon the filing of the articles and shall continue perpetually, unless otherwise expressly provided by law.

"*Filing of copy.* A copy of the articles certified by the Secretary of State, and bearing the indorsement of the date of filing in his office, shall be filed in the office of the county clerk of the county in which the corporation is to have its principal office."

Sec. 293—(Requires registration of the certified copy of the articles in certain county clerks' offices.)

Sec. 308—"*Officers and committees:* (How chosen: One person holding several offices: Exer-

*cise of another officer's powers: Duties: Appointment of executive committee: Delegation of powers.)*

Every corporation shall have a president, a vice-president, a secretary and a treasurer, who shall be chosen by the board of directors. A corporation may have such other officers as may be deemed expedient, who shall be chosen in such manner and hold their offices for such terms as may be prescribed by the by-laws. Any two or more of such offices, except those of president and secretary, may be held by the same person. Any vice-president, assistant treasurer or assistant secretary, respectively, may exercise any of the powers of the president, the treasurer or the secretary, respectively, as provided in the by-laws or directed by the board of directors, and shall perform such other duties as are imposed upon him by the by-laws or the board of directors.

“The by-laws may provide for the appointment by the board of directors of an executive committee and other committees and may authorize the board to delegate to the executive committee any of the powers and authority of the board in the management of the business and affairs of the corporation, except the power to declare dividends and to adopt, amend or repeal by-laws. The executive committee shall be composed of two or more directors.”

Sec. 326. *“Certificate for shares.* All stock corporations must issue certificates for shares, when fully paid, which shall state:

(1) The name of the record holder of the shares represented thereby;” etc. . . .

“Signature. Every certificate for shares issued by a corporation must be signed by the president or a vice-president and the secretary or an assistant secretary, or must be authenticated by facsimilies of the signatures of its president and secretary or by a fac-

simile of the signature of its president and the written signature of its secretary or an assistant secretary. Before it becomes effective every certificate for shares authenticated by a facsimile of a signature must be countersigned by a transfer agent or transfer clerk and must be registered by an incorporated bank or trust company, either domestic or foreign, as registrar of transfers.”

Sec. 326(a)-329. (Regulate the issuance of partly paid share certificates, exchange, transfer and adverse claims between various types of share-holders.)

6. California Corporation Securities Act, as Amended (Deering's California General Laws, 1944, Act 3814, Secs. 2(8), 3, 16, 33).

Sec. 2(8)—(Defines “sell” as including “subscription” for a security.)

Sec. 3.—“*Necessity for permit to sell securities: Application: Contents.* No company shall sell any security, except upon a sale for a delinquent assessment against such security made in accordance with the laws of this State, or offer for sale, negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do. Such application shall be in writing, shall be verified as provided in the Code of Civil Procedure for the verification of pleadings, and shall be filed in the office of the commissioner. In such application the applicant shall set forth the following:

“(a) The names, residences, and post-office addresses of its officers.

“(b) The location of its principle office, etc. . . .

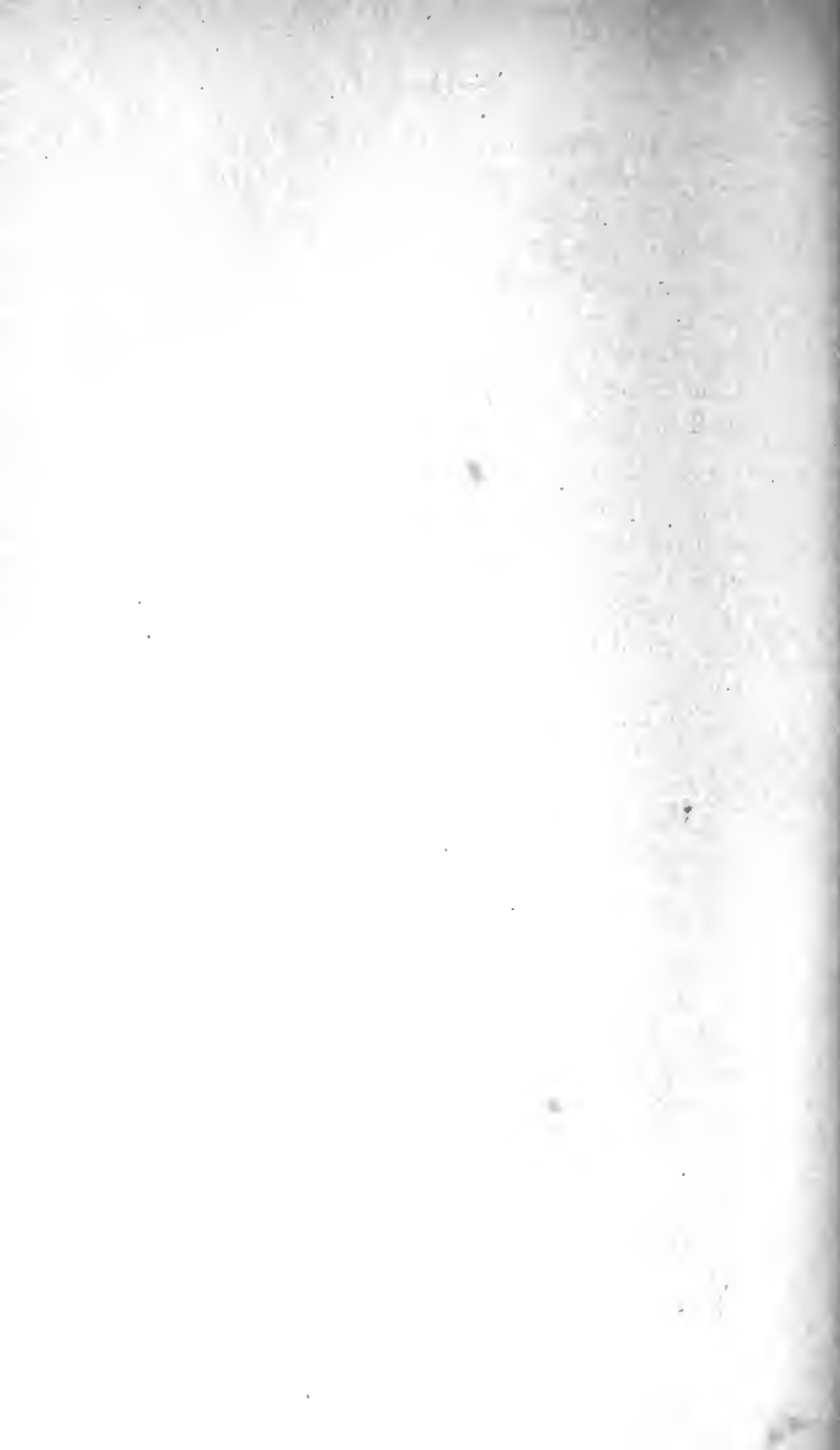
“(q) Such additional information concerning the company, its condition and affairs, as the commissioner may require.”

Sec. 16.—“*Securities issued or sold illegally void.* Every security issued by any company without a permit of the commissioner authorizing the same then in effect, shall be void, and every security issued by a company with the authorization of the commissioner but which has been sold or issued in nonconformity with the provisions, if any, contained in the permit authorizing the issuances or sale of such security shall be void.”

Sec. 33.—“*Subscription to share prior to incorporation.* Neither this act nor any provision hereof shall be deemed to prohibit subscriptions for shares of a domestic or foreign corporation made prior to the incorporation thereof; but such subscription shall be deemed to have been made and accepted upon the condition that such corporation shall be incorporated within ninety days thereafter, and, when incorporated, shall with reasonable diligence apply for and secure from the commission a permit authorizing the issue of the shares so subscribed for, in accordance with such subscriptions; . . .”

#### 7. California Code of Civil Procedure.

Sec. 1973a-1. “A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged, or his agent in that behalf.”





No. 11,660

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

JACOB S. GIMPELSON,

*Appellant,*

*vs.*

MAX KAUFMAN, doing business as the CHICAGO HOTEL  
AND RESTAURANT SUPPLY; and CHICAGO HOTEL, RES-  
TAURANT AND MEAT SUPPLY, INC., a corporation,

*Appellees.*

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## BRIEF FOR APPELLEES.

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No. 11,660  
IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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JACOB S. GIMPELSON,

*Appellant,*

*vs.*

MAX KAUFMAN, doing business as the CHICAGO HOTEL  
AND RESTAURANT SUPPLY; and CHICAGO HOTEL, RES-  
TAURANT AND MEAT SUPPLY, INC., a corporation,

*Appellees.*

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BRIEF FOR APPELLEES.

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Statement of the Case.

This is a re-employment case arising under the Selective Training and Service Act of 1940, as Amended (Secs. 8, 16(b), 50 U. S. C. A. App. Secs. 308, 316(a)), hereinafter referred to for convenience as "the Act." The case is here on appeal from a District Court judgment in favor of appellees.

The basic issues involved in the appeal are:

1. *Is re-employment dictated by the Act where the employer for imperative business necessity and in good faith transfers his business to a new enterprise in which he obtains a minority interest?*

2. *Is the new enterprise obligated to employ by reason of the minority interest held by the former employer?*

3. *Is there an application for re-employment by reason of the fact that after full explanation of the new enterprise and the changed conditions, the former employee accepts from the new enterprise a different position with different pay, status, and duty, making no objection till after the expiration of the statutory period for application, and knowing in the meantime that further investment is being made in the business?*

The trial court answered all of these questions in the negative.

While appellant argues (App. Br. Point IV, p. 67) that there was a discharge without cause within one year after "re-employment", this cannot be deemed to be an issue in the case for appellant concedes that there was not "re-employment" within the meaning of the Act (50 U. S. C. A. App. Sec. 308(b)), and there is therefore no occasion to consider rights which accrue only "after such restoration" (50 U. S. C. A. App. Sec. 308(c)).

Appellant specifies no error in Findings of Fact I, II, III, IV, V, and VI. Therefore, the following facts are undisputed:

On and prior to October 23, 1942, the appellee Kaufman owned and operated a wholesale and retail meat business on Temple Street, Los Angeles, and a meat market on Fairfax Avenue, Los Angeles, and employed appellant, a nephew, in the Temple Street business.

On October 23, 1942, the appellant left his position in appellee Kaufman's Temple Street business to perform training and service in the Army, into which he was on that day inducted under the Selective Training and Service Act of 1940. The appellant entered on active duty November 6, 1942, and satisfactorily completed his period of training and service on November 6, 1945.

In 1943, appellee Kaufman sold the Fairfax market, and thereafter devoted his full time and attention to the Temple Street business.

In December, 1944, the State of California, in eminent domain proceedings, condemned for road purposes the premises on which the Temple Street business was conducted. In 1944, the Temple Street premises were declared by an official of the City of Los Angeles to be unfit for the conduct of a wholesale meat business.

In 1944 and 1945, the appellee Kaufman (a man past sixty years of age) was in ill health, and was advised by a physician to retire from business. By reason of ill health, the difficulties of staying in business during the meat shortage, and the necessity of finding new premises for the business, the appellee Kaufman intended to retire from business completely, and would have done so but for the intervention of his two brothers, one of whom had previously been a business partner.

Omitting the disputed portions of Findings of Fact VII and VIII, the following are added to the undisputed facts:

In 1945, the three brothers agreed to form a corporation in which the appellee Kaufman would own 40% of the capital stock, and his two brothers 30% each.

In furtherance of this agreement, one of the brothers sold out his business interests in Chicago, and moved his family to Los Angeles.

Before incorporating, the two brothers of appellee Kaufman advanced Eleven Thousand Dollars (\$11,000.00) with which to carry on the business and purchase new premises. Appellee corporation was incorporated January 21, 1946, and commenced active business operation on April 2, 1946.

Additional facts (concerning which there is controversy) are as follows:

At the same time appellee Kaufman and his two brothers agreed to form the corporation, it was agreed that until the corporation began functioning, the former business would be run as a partnership with interests the same as in the contemplated corporation, *i. e.* 40% to appellee Kaufman and 60% to his two brothers; so that, in fact, when appellant returned from service, appellee Kaufman neither owned nor controlled the business.

The corporation was formed for a *bona fide* business purpose, and is not appellee Kaufman's *alter ego*—he being

merely a minority stockholder. Total monies supplied by appellee Kaufman and his brothers have increased the capital investment in the corporation to approximately three times the value of the former business.

When appellant returned from service, it was explained to him that his former employer no longer owned the business. Appellant nonetheless accepted work in the new business without objection, in a position different in duty and compensation than his pre-war job. Appellant made no application for re-employment in his pre-service position or one of like seniority, status, and pay, until more than ninety (90) days after his discharge from the service.

The specific questions to be decided by this Court, therefore, are:

1. Are the following Findings of Fact “clearly erroneous”?:

(1) That portion of Finding VII reading:

“ . . . it was further agreed by the three brothers that before the corporation began functioning, the business would be run as a partnership, with interests in the above proportions.” [R. p. 24.]

(2) That portion of Finding VIII reading:

“Additional monies supplied by the three brothers has increased the capital investment in the corporation to approximately three times the value of the respondent Kaufman’s former business. There is no evidence to indicate that respondent corporation was

not formed for a *bona fide* business purpose, or that it is the alter ego of the respondent Kaufman.” [R. p. 24.]

(3) Finding IX:

“In January, 1946, respondent Kaufman neither owned nor controlled the business where petitioner was formerly employed. Petitioner was employed in the business under the new ownership in January, 1946, and on April 2, 1946, by respondent corporation, in a position different from the one held by petitioner on October 23, 1942. This new position was accepted by petitioner without objection after a full explanation of the changed circumstances and character of the business.” [R. pp. 24-25.]

(4) Finding X:

“Petitioner made no application for re-employment in his former position, or a position of like seniority, status, and pay prior to late March or April, 1946.” [R. p. 25.]

2. In any event, under the facts of the case,

(1) Were the employer's circumstances so changed as to have made re-employment unreasonable?

(2) Was the corporate appellee obligated to re-employ?

(3) Was there a timely application for re-employment?

## ARGUMENT.

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### POINT I.

#### Summary.

Under the most liberal construction of the Selective Training and Service Act that is possible without doing violence to the clear language of the law, there was in this case a substantial change of circumstances making re-employment clearly unreasonable, under any practical or reasonable interpretation of the Act. This alone is sufficient to sustain the judgment.

Through no fault of his own, the former employer's business premises were taken in eminent domain proceedings. The situation was succinctly described by the trial judge [R. p. 156].

"The business, the property itself was effected and disposed of. He disposed of the Fairfax market in the meantime.

"Here was a man who was getting along in years. He had to either pull out or bring in new blood. Those things necessarily transpired. They were not done intentionally for the purpose of avoiding any responsibility that he may have owed to the petitioner. I feel that conditions had so changed that for him to have done otherwise would have been unreasonable and impossible."

The new enterprise in this case brought into the business new capital, and—of decisive importance—new ownership. Ownership formerly vested one hundred (100%) per cent in the appellee Kaufman, was so affected as to leave him with a minority forty (40%) per cent interest with control, sixty (60%) per cent, in the hands of persons who before had no ownership whatsoever. This is a far cry from any of the cases remotely connected with the point, which are cited by appellant, in every one of which there was simply change of form and not of substance.

Under the Act, application for re-employment within ninety (90) days of discharge is a condition precedent to any obligation to restore to former position. On this point, two generalizations may be made concerning the cases cited by appellant where re-employment was ordered:

(1) Without exception, in every case there was timely application, and refusal of re-employment.

(2) Without exception, in every case where restoration was denied by the employer and a different job offered, the veteran rejected such employment.

In the case at bar, there was no timely application. This alone is sufficient to sustain the judgment. In addition, the appellant accepted a different employment without objection, with knowledge of the facts. This knowledge included the fact that new money was to be added (and was added) to the business after such new employment.

On the question of application for re-employment, as well as other matters, there were conflicts in the testimony. These, the trial judge—observing the demeanor of the witnesses—properly resolved in favor of appellee.

Analysis of the evidence (misquoted, miscited, and misconstrued in appellant's so-called "The Facts"\*) and the applicable law demonstrates that:

(1) Appellant has not sustained the burden of proving that the disputed Findings are "clearly erroneous";

(2) The Findings are supported by substantial evidence and are clearly correct;

(3) The Conclusions of Law are plainly dictated by the law and the facts of the case; and

(4) The judgment of the trial court is manifestly just, and should be affirmed.

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\*Pertinent portions of the so-called "The Facts" (App. Br. pp. 15-52) are discussed at a later point.



## POINT II.

### Weight of Findings of Fact on Appeal.

1. The Burden Is on the Appellant to Show That the Disputed Findings Are "Clearly Erroneous."

The pertinent portion of Rule 52(a) of the Federal Rules of Civil Procedure reads as follows:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In accordance with the foregoing rule, this Court has consistently held that the burden is on the appellant to show that the trial court's findings are "clearly erroneous."

*Augustine v. Bowles etc.*, 9 Cir., 149 F. (2d) 93, 96 (1945);

*Gates et al. v. General Casualty Co. of America*, 9 Cir., 120 F. (2d) 925, 927 (1941).

2. The Appellant Is Discredited as a Witness.

This Court has likewise taken occasion to stress the role of the trial judge in passing on the credibility of witnesses.

*Universal Pictures Co., Inc. v. Cummings*, 9 Cir., 150 F. (2d) 986, 987 (1945);

*Gates et al. v. General Casualty Co. of America*, *supra*.

In the *Universal Pictures Co. Inc. Case, supra*, this Court commented:

“These are the findings of a judge who had the advantage of hearing the testimony and judging the credibility of the witnesses.”

In the instant case, the District Court judge had the opportunity to compare the testimony of the glib appellant with the broken but honest English of the appellee Kaufman. He was able to compare the rapid-fire, ready recollection of appellant on direct examination with appellant's halting and contradictory back-tracking on cross-examination.

To note but a few examples:

(1) On the question of new money in the business, appellant at first denied and then admitted that he knew outside capital had come into the business [R. p. 61].

(2) On the question of objection to salary, appellant (speaking of appellee Kaufman) at first gratuitously volunteered:

“I had never asked him for money as long as I had been with him.” [R. p. 64.]

Soon realizing, however, that this was very poor testimony, he recalled “many” times that he had complained to appellee Kaufman about his low salary [R. p. 65].

(3) On the question of appellant's talk of trouble with the Office of Price Administration unless appellant were employed, appellant at first denied that he had mentioned "OPA" to appellee Kaufman; yet, after some prodding, admitted that he had [R. pp. 70, 71].

Other instances of the unreliability of appellant as a witness, and of his being given the lie by appellee Kaufman, will be noted in the body of the argument.

At the conclusion of all the testimony, the trial court declared:

*"I want to say frankly, that I have been more impressed by Mr. Kaufman than I have been with the petitioner in their testimony. It carries more weight with me."* [R. p. 155.]

### POINT III.

The Employer's Circumstances Have so Changed That It Would Have Been and Is Unreasonable to Restore Appellant to His Former Position or to a Position of Like Seniority, Status, and Pay.

#### 1. Nature of the Provision.

##### A. CONSTITUTIONAL QUESTION.

Even though all other conditions of the Act are met, restoration is not required if:

“ . . . the employer's circumstances have so changed as to make it impossible or unreasonable to do so;”. (Section 8.)

The importance of this provision from the standpoint of the Federal Constitution is indicated in *Trusted Funds, Inc. v. Dacey*, 1 Cir., 160 F. (2d) 413, 419 (1947), where it is stated:

“The qualification in Section 8 . . . certainly removes any question as to the validity of Section 8 under the due process clause.”

Thus it appears that the drafters of the Act intended to make constitutionally certain that the re-employment power would not be arbitrarily exercised, but would be applied with care to the circumstances of every individual situation.

##### B. RULE OF CONSTRUCTION.

Appellant properly states that the Act is to be liberally construed in favor of the veteran (App. Br. p. 53). Such doctrine is approved by the Supreme Court of the United States in *Fishgold v. Sullivan Drydock & Repair Corp.*,

*et al.*, 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. ..... (1946). It is important to note however, that the *Fish-gold Case* itself was decided against the veteran, indicating that an announced rule of liberal construction is not to be taken as a license to do violence to the Act itself or to the rights of citizens generally. That this is so, is emphasized in the later case of *Trailmobile Co., et al. v. Whirls*, 331 U. S. 40, 60, 67 S. Ct. 982 (1947), where the high court in reversing a judgment in favor of the veteran declared:

“These reasons, founded in the literal construction of the statute and the policy clearly evident on its face, are sufficient for the disposition of the case.”

This Court, too, in a decision discussed later in this brief (pages 15, 47 and 56), has indicated that the Act is not to be “liberally” construed out of all reasonable shape.

*Brown v. Luster, et al.*, 9 Cir., No. 11,544 (1947).

That the judge of the District Court deciding the case at bar was thoroughly aware of the rule of liberal construction is abundantly clear. *Lee v. Remington Rand, Inc.*, 68 F. Supp. 837, 839 (1946), cited by appellant (App. Br. p. 53) as an authority for liberal construction, was decided by the same District Court judge who heard the instant matter. That the court had the rule in mind during the trial of this action is apparent from the record [R. p. 90]:

“It has been the policy of this court to give the petitioners the break. In other words, give the evidence a liberal construction.”

### C. APPLICATION TO VARIED SITUATIONS.

What exactly constitutes such a change of circumstances as to render restoration impossible or unreasonable has been determined in a variety of factual situations.

#### (i) *Cases Where Restoration Has Been Ordered.*

The mere fact that re-employment would make for some loss of efficiency or added expense, is not grounds for refusal of re-employment (*Kay v. General Cable Corporation*, 3 Cir., 144 F. (2d) 653 (1944)).

A divided court has held that where, by a change in the supply of and demand for a commodity, the veteran would earn monies in excess of his pre-war earnings, there was not such a change of circumstances, at least not when it was shown that others working for the employer were doing the veteran's prior work at the increased compensation (*Levine v. Berman*, 7 Cir., 161 F. (2d) 386 (1947)).

Testimony of a financial crisis in the affairs of the employer has been rejected when it affirmatively appeared that when the veteran applied for re-employment such conditions no longer existed and it was then reasonable to re-employ (*Van Doren v. Van Doren Laundry Service, Inc.*, 3 Cir., 162 F. (2d) 1007 (1947)).

The foregoing are the cases cited by appellant under the heading of impossibility or unreasonableness of restoration (App. Br. p. 65).

Concerning changes in ownership and control, some courts have decided the matter by the test of "change of circumstances," others by the test of whether or not the new business were actually the old employer.

On this phase of the problem appellant has cited (App. Br. p. 66) four cases arising under the Act: the reversed decision of the Sixth Circuit in *Trailmobile Co., et al. v. Whirls*, 6 Cir., 154 F. (2d) 866 (1946), involving the merger of a *wholly owned* subsidiary with the parent corporation; *Sullivan v. Milner Hotel Co., et al.*, D. C., E. D. Mich. S. D., 66 F. Supp. 607, 610 (1946), involving the switch of salary disbursing and bookkeeping functions only, from one to another of two affiliated corporations in the same hotel chain, "without any other change in the conduct, composition, ownership or control of such office . . ."; *Karas v. Klein, et al.*, D. C., D. Minn., 3rd Div., 70 F. Supp. 469, 472 (1947), where the partners who were the pre-service employers became *all* the officers and owned *all* the stock of a successor corporation, the court declaring that: "The change is one of form rather than substance."; and the decision of this Court in *Brown v. Luster, et al., supra*, which was a case decided *against*, not for, the veteran, and in so far as it has any relevance to the proposition for which it is cited by appellant, simply calls attention to the fact that where all the pre-service partners incorporated their business "the identity of the business was not lost by such change."

(ii) *Cases Where Restoration Has Been Denied.*

The required change of circumstances may arise through a substantial decrease in the volume of business (*Meyers v. Barenburg*, 4 Cir., 161 F. (2d) 850 (1947)); misconduct on the part of the former employee (*McClayton v. W. B. Cassell Co.*, D. C., D. Md., 66 F. Supp. 165 (1946)); or a change in method of doing business incident to new stock ownership of the employer corporation (*Featherston v. Jersey Central Power & Light Co.*,

3 Cir., 161 F. (2d) 1000 (1947)), this latter decided by the same tribunal which decided *Kay v. General Cable Corporation, supra*.

It has been repeatedly held that a new owner, corporate (*Hastings v. Reynolds Metals Co.*, D. C., N. D. Ill., E. Div., 12 C. C. H. Lab. Cases 70, 797, Par. 62, 680, #46c, 1431 (1947)) or individual (*McFadden v. Dienelt, et al.*, D. C., N. D. Calif., S. D., 68 F. Supp. 951 (1946)); *Newman v. Finer*, D. C., S. D. Calif., Cent. Div., 11 C. C. H. Lab. Cases 69, 657, Par. 63, 307 (1946)) is not obligated to employ the former employee of the purchased business. This is true whether the purchase be of a portion of the assets of the old business (*Hastings Case, supra*) or of all the assets (*McFadden Case, supra*; *Newman Case, supra*).

(iii) *Discretion of the District Courts.*

The foregoing cases, decided for and against restoration, make it abundantly clear that no hard and fast rule exists as to precisely what constitutes such a change of circumstances as to make re-employment impossible or unreasonable. The very word used in the Act, “*unreasonable*”, one of constitutional as well as common-law significance, indicates an intent to permit wide scope of application.

On this point, instructive interpretation is found in the language of the First Circuit in the cross appeals of *Boston & M. R. R. v. Bentubo*, 1 Cir., 160 F. (2d) 326, 328 (1947), and *Bentubo v. Boston & M. R. R.*, same cite, referred to by appellant in another connection (App. Br. p. 67):

*“In the first place Congress did not make the right to re-employment absolute. It gave that right only*



*when the employer's circumstances had not so changed as to make it not only not impossible, but also not 'unreasonable' for the employer to re-employ the veteran. It must therefore have envisaged the probability that in the future an infinite variety of factual situations would arise, and recognizing the futility of any attempt to prescribe a remedy for every situation, it contented itself with a statement of a public policy and left the application of its policy to particular situations to the sound discretion of the district court."*

In this, as in other situations where the matter is left to the discretion of the trier of fact, there should be affirmance unless there is shown a clear abuse of discretion.

## 2. Essential Facts Concerning Change of Circumstances.

### A. APPELLEE KAUFMAN'S BUSINESS BEFORE APPELLANT WENT INTO MILITARY SERVICE, OCTOBER 23, 1942.

#### (i) *Ownership.*

Concededly, exclusively owned and operated by Kaufman [*undisputed* Finding II, R. p. 23], although in his erroneous statement of "The Facts", (point (3)) appellant obfuscates the fact by describing the period of ownership as "From 1936 until April 1, 1942" (App. Br. p. 15).

#### (ii) *Location.*

A wholesale and retail meat business on Temple Street, Los Angeles, and a meat market on Fairfax Avenue, Los Angeles [*undisputed* Finding II, R. p. 23].

(iii) *Manner of Operation of Temple Street Business.*

Stores for the conduct of this business were leased, but the adjoining piece of ground—essential to the wholesale business—was owned by appellee Kaufman. The necessity for having this ground was explained by him as follows [R. p. 127]:

“A. Well, you see this business—I will explain it, this wholesale business. If you can’t drive in with a truck and if you can’t drive out with a truck, delivery, then the store wasn’t any good. I had my own property there but I used to have a drive-in there and I used to have a storage place before I started in to build. We put up papers and all and we deliver—Cudahy brings in the meat to the rear and we deliver it inside on a rail. You see that wholesale goes on a rail and then when we send our trucks out we send them out from the rear, too, you see. We have got to have a rear platform. We have to have a place to unload it, so the main thing was my piece of real estate because the store alone don’t do any good.”

B. IN 1943, APPELLEE KAUFMAN SOLD THE FAIRFAX MARKET, AND THEREAFTER DEVOTED HIS FULL TIME AND ATTENTION TO THE TEMPLE STREET BUSINESS [undisputed Finding IV, R. p. 23].

Relying on the testimony of the discredited appellant, the latter’s counsel comments (App. Br. p. 21) that before the sale of the Fairfax market, appellee Kaufman had “‘spent practically all his time on Temple Street’”.

The fact is that seven months before he was drafted, appellant was given increased compensation so that his employer would be able to spend more time at the Fair-

fax market. On this point, appellee Kaufman testified as follows [R. p. 119]:

“ . . . and I was trying to satisfy him because at that time I had a market on Fairfax and I was trying to hold to that market . . . The cooler over there was very good so I thought I will have more time to spare on Fairfax because it is a new market and a great big cooler to do the wholesaling there in the future and Jack should get a little more money here for temporary . . . I just give it to him that time because I wanted to have more of his time—more time he should put into the business. He should take care of that business. I should be able to go down to that market.”

Appellant's attempt to belittle the responsibilities and duties of the owner of a meat market [R. p. 40] was simply another illustration of his own unreliability.

In any event the Fairfax market was sold due to notorious difficulties in the meat business with the advent of rationing [R. p. 120]. Even appellant does not endeavor to establish a sinister attack on appellant's "rights" in this sale.

#### C. FACTORS DICTATING APPELLEE KAUFMAN'S INTENTION TO RETIRE FROM BUSINESS.

##### (i) *Condemnation of the Business Premises.*

“In December, 1944, the State of California, in eminent domain proceedings, condemned for road purposes the premises on which the Temple Street business was conducted” [portion of *undisputed* Finding V, R. p. 23].

In complete disregard of the fact that “the premises on which the Temple Street business was conducted” con-

sisted in part of rented buildings and in part of essential adjoining ground, owned by appellee Kaufman (see, *supra*, page 18), “Manner of Operation of Temple Street Business”), appellant in his point (31) of so-called “The Facts” states merely that “the rented property” had been condemned. (App. Br. p. 36.)

As an owner and businessman, appellee Kaufman was consequently faced with the practical necessity of acquiring new premises [portion of *undisputed* Finding VI, R. pp. 23-24], *i. e.*, new buildings, with adjoining vacant land essential to the wholesale meat business, or quit the business.

(ii) *Unfitness of Temple Street Premises for Wholesale Meat Business.*

“In 1944, the Temple Street premises were declared by an official of the City of Los Angeles to be unfit for the conduct of a wholesale meat business” [portion of *undisputed* Finding V, R. p. 23].

Despite the fact that he has specified no error in this finding, appellant in point (16) of his so-called “The Facts” unwittingly, or otherwise, fixes the time of the objection of the Los Angeles City Health Department as 1941 (App. Br. p. 21) instead of the undisputed date—1944.

(iii) *In 1944 and 1945 the Former Employer Was Past Sixty Years of Age*—[portion of *undisputed* Finding VI, R. p. 23].

(iv) *In 1944 and 1945 the Former Employer Was in Ill Health and Was Advised by a Physician to Retire From Business*—[portion of *undisputed* Finding VI, R.

p. 23]. He was, in fact, suffering from an enlargement of the heart [R. p. 121].

(v) *In 1944 and 1945 Meats Were Difficult to Obtain, and It Was Difficult for That Reason to Remain in the Meat Business*—[portion of *undisputed* Finding VI, R. p. 23].

D. IT IS NOT QUESTIONED BY APPELLANT THAT BY REASON OF THE FOREGOING FACTORS, APPELLEE KAUFMAN WOULD HAVE RETIRED FROM BUSINESS COMPLETELY HAD IT NOT BEEN FOR THE INTERVENTION OF HIS TWO BROTHERS [*undisputed* Finding VI, R. pp. 23, 24].

Despite the fact that appellant has bound himself by failing to specify any error in Finding VI, he now seeks to weaken the vigor of his admission by deliberate misconstruction of the Record [App. Br. p. 22, point (20) of so-called "The Facts"]. Appellant states: "For this reason, he *needed managerial assistance* [*sic*] on Temple Street, and without it, he intended to retire." This conclusion by appellant is so patently false that it is deemed necessary to draw attention to his citation to the Record.

To substantiate his point he cites page 23 of the Record, apparently a reference to *undisputed* Finding VI, which reads as follows:

"In 1944 and 1945, the respondent Kaufman (a man past sixty years of age) was in ill health, and was advised by a physician to retire from business. By reason of ill health, the difficulties of staying in business during the meat shortage, and the necessity of finding new premises for the meat business, the respondent Kaufman intended to retire from business completely, and would have done so but for the in-

tervention of his two brothers, one of whom had previously been a business partner.”

The only other references to the Record are to pages 121 and 122, the only pertinent portions of which follow here *totidem verbis*:

“(Testimony of Max Kaufman)

Q. By Mr. Mellinkoff: Mr. Kaufman, how did it happen that your brothers put money into your business? A. Well, the two brothers? Put money into the business?

Q. Yes. A. When they condemned my real estate the State bought it for a highway and, well, they didn't give me very much money for it and I have an enlargement of my heart and I am over 60. I am way beyond 60.

The Court: How old are you?

The Witness: I am 62.

The Court: You are not old.

The Witness: And my son is a medical man and he was giving me instructions—I shouldn't be active in business and the fact, you know, I have got medicine from every doctor what he send me to—to Dr. Goldberg and Dr. Ferris.

Q. By Mr. Mellinkoff: That is all right, Mr. Kaufman. A. And he didn't want me to become active in the business so I was figuring at that time when the State got the real estate I wanted to sell my trucks and make a little money whatever I can and get out of it altogether.

After my younger brother Joe came and Morris was in the business I used to be in business with Morris—

The Court: Don't go into all the details. Just tell what happened.

The Witness: So Joe propositioned me. He is going to invest money to build a new place, a sanitary place, and Morris went in with it, so we made between ourselves an agreement and they were satisfied with my leadership not to work too hard. We should continue in this business and I am very happy they were.

Q. By Mr. Mellinkoff: All right. Now, Mr. Kaufman—

The Court: Then, as I understand it, you were figuring on quitting business until your brothers wanted you to continue the business?

The Witness: I would yes, if they won't—if they won't start into this business with me I would have sold it all out. I couldn't run it any longer."

It thus must be conceded by appellant that the factors which prompted appellee Kaufman's planned retirement were in no way connected with appellant or his former position.

#### E. INITIATION OF THE NEW ENTERPRISE.

The witness Asimow corroborating appellee Kaufman, *supra*, in substantial detail testified as follows [R. p. 101]:

"Q. Do you know how it happened that this new capital came into the business at all? A. Yes. I was aware of it. As I say, Joseph Kaufman came from back East in November and Max approached him with the idea of putting this capital into the business in order to put up a building because they could no longer continue under their present circumstances and he felt that if he—that he would

rather go out of business than risk his own capital in this new venture and that if Joseph Kaufman, who was looking for a proposition at the time, was interested they would all pool their resources and put up this building and incorporate it and so share the responsibilities and the risk involved.”

F. AGREEMENT CONCERNING THE NEW ENTERPRISE.

Appellant has not taken specific exception to Finding VII [R. p. 24]; but though his citation is in error (App. Br. p. 11) appellant does controvert the italicized portion of Finding VII, which Finding reads as follows:

“In 1945, the three brothers agreed to form a corporation in which the respondent Kaufman would own 40% of the capital stock, and his two brothers 30% each; *it was further agreed by the three brothers that before the corporation began functioning, the business would be run as a partnership, with interests in the above proportions.* In furtherance of this agreement, one of the brothers sold out his business interests in Chicago, and moved his family to Los Angeles.”

There was abundant testimony requiring the finding:

(i) *William E. Asimow.*

“The Court: In the incorporation how were the shares divided?

The Witness: 40 per cent to Max Kaufman and 30 per cent to Joseph Kaufman and 30 per cent to Morris Kaufman.” [R. p. 100.]

“Q. By Mr. Mellinkoff: When was the corporation actually incorporated, do you know that? A. January 22d, 1946.



Q. Now, prior to the incorporation of the corporation do you know whether or not there was any understanding between Max Kaufman, Morris Kaufman and Joseph Kaufman as to their relationship in that business? A. At the time they first discussed the corporation in November of 1945, they agreed that as soon as the charter came through, why, they would consider themselves all members of the same business.

Q. They agreed to what? A. They would consider themselves as partners, as members of the business. I was advised that the corporation charter had been issued January 22nd, and I was instructed to begin drawing up corporation books, but I didn't have the time necessary to do it so I suggested that they work out the same basis, the corporate basis and use that as a distribution of the profits for the three months so there would be no misunderstanding between the three of them as to who was to share in the profits the first three months while I was preparing the records." [R. pp. 100-101.]

"The Witness: They acted in a rather managerial capacity.

The Court: But their interest in the business was the same as in the corporation?

The Witness: That is right.

The Court: So that it was in a sense, until the corporation went into effect, a partnership?

The Witness: It was an unofficial partnership. It was an interim status until the corporation could be effected." [R. p. 104.]

"The Court: I know but your statement makes it more confusing than ever. These other parties invested money in the business with the understand-

ing that it would be incorporated and the two brothers were to get a 30 per cent interest each?

The Witness: Correct.

The Court: 30 per cent of the stock, and that money went into the business before they were actually incorporated and before the corporation took over the business?

The Witness: That is right." [R. p. 105.]

"They felt that the corporation should be organized when the charter was issued and the business was very profitable for the first three months and they felt they would be cheated unless they had some basis for sharing in those profits. At that time they considered themselves members of the business. At the time it was just a matter of formality that the corporation was not started until April 1st." [R. p. 106.]

(ii) *Max Kaufman.*

"The Witness: So Joe propositioned me. He is going to invest money to build a new place, a sanitary place, and Morris went in with it, so we made between ourselves an agreement and they were satisfied with my leadership, not to work too hard. We should continue in this business and I am very happy they were.

Q. By Mr. Mellinkoff: All right. Now, Mr. Kaufman—

The Court: Then, as I understand it, you were figuring on quitting business until your brothers wanted you to continue the business?

The Witness: I would, yes, if they won't—if they won't start into this business with me I would have sold it all out. I couldn't run it any longer." [R. pp. 121-122.]

(iii) *Joseph Kaufman.*

“The Witness: At that time I gave a deposit on a piece of ground, in escrow \$2,000 and more money followed immediately for my partnership in this business.

The Court: What was your agreement? Under what circumstances did you make a deposit upon this ground? What agreement did you have with your brother Max?

The Witness: Your Honor, when I came here I found out that my brother has to go away from the business, that his place is going to be taken away by the State. He was downhearted a little bit after being in business so long in one place, so I tried to cheer him up. I said ‘Nothing is lost yet. We don’t know. And I might go in with you. We will see what we can do.’ And I talked it over with my middle brother, Morris Kaufman, and then I spoke to Max again and I give him a proposition.

The Court: What proposition did you give him?

The Witness: I said, ‘Max, what is the use of being downhearted and being sick about it? We will go in. We will build up a new business, a real good going business, and we will be proud of it and I will make you proud of the business that you are in right now,’ and I am trying to do that, your Honor.

The Court: Well, did you have any understanding at that time as to the shares? Did you have an understanding with reference to the 40, 30, and 30 basis?

The Witness: Not that my brother asked for it, but his accountant asked for 51 per cent.

The Court: His accountant did?

The Witness: Yes. You know a matter of routine—just conversation. So I explained to him I wouldn't give up a business in Chicago and sell out and come here to my brothers and feel that I only got a minor part in the business. I said, 'I think I am capable of taking an active part and it wouldn't be fair to all of us but it would be fair,' being that he is in the business, 'you should go in 30, 30 and 40.'

The Court: When did you agree on that?

The Witness: That was in 1945, your Honor.\*

The Court: When did you decide to incorporate?

The Witness: Right then and there when we went out to buy a piece of ground. I came in when I made up my mind and I set my mind to business immediately and we went out to look up the piece of ground and I gave a personal check, deposit of \$2,000 immediately." [R. pp. 135-136.]

(iv) *Morris Kaufman.*

Briefly questioned by the Court and by counsel for appellant, this witness likewise testified that it had been agreed that he was to have a 30 per cent interest [R. pp. 140-141].

G. FUNCTIONING OF THE NEW ENTERPRISE.

Concerning the functioning of the new enterprise, appellant specifies no error in the first part of Finding VIII [R. p. 24], but takes exception to the portions of Findings VIII and IX italicized below:

"FINDING VIII.

"Before incorporating, the two brothers of respondent Kaufman advanced Eleven Thousand Dol-

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\*Appellant has misquoted the record to make this date read "1946" (App. Br. p. 39).

lars (\$11,000.00) with which to carry on the business and purchase new premises. Respondent corporation was incorporated January 21, 1946, and commenced active business operation on April 2, 1946. *Additional monies supplied by the three brothers has increased the capital investment in the corporation to approximately three times the value of the respondent Kaufman's former business. There is no evidence to indicate that respondent corporation was not formed for a bona fide business purpose, or that it is the alter ego of the respondent Kaufman.*"

"FINDING IX.

*"In January, 1946, respondent Kaufman neither owned nor controlled the business where petitioner was formerly employed. . . ."*

As to the question of good faith, the "Factors Dictating Appellee Kaufman's Intention to Retire From Business" (*supra*, page 19) and the undisputed Finding VI discussed in subdivision "D" (*supra*, page 21) are sufficient to indicate that there were *bona fide* reasons for founding the new business, unconnected in any way with the appellant.

Further, a statement by the trial court, concurred in by appellant's counsel, explicitly negatives bad faith [R. pp. 154, 155]:

" . . . That is an involuntary divestiture of the obligation, but where he willingly does so for his own benefit—

The Court: Counsel, just a moment. That is an unfair statement: " 'He willingly did so.' " There is nothing here to indicate any bad faith on the part of Mr. Kaufman in disposing of his business.

Mr. McCall: I did not mean that.

The Court: And I think that is an unfair inference.

Mr. McCall: I did not mean to make such an inference, your Honor."

As to the further questioned facts that the monies invested in the new enterprise prior to incorporation in fact constituted a present—and not some speculatively future interest—there was abundant evidence requiring the Findings:

(i) *William E. Asimow.*

"Q. By Mr. Mellinkoff: Mr. Asimow, do you know whether or not prior to the incorporation of the respondent corporation, whether or not any additional capital was put into Max Kaufman's business from others than Max Kaufman? A. Yes. Additional capital was put in in November. They went into escrow on the property across the street with funds advanced by Joseph Kaufman.

Q. How much money was put in? A. I believe he put in \$6,000 at that time.

Q. What is that? A. \$6,000.

Q. Who put in \$6,000. A. Joseph Kaufman.

Q. Did Morris Kaufman put in anything? A. At a subsequent date Mr. Morris Kaufman put in \$5,000.

Q. Was that before the incorporation or after the incorporation. A. That was before the incorporation, or, now, the \$5,000 may have come in shortly after the charter was issued, but all this money came in before the books were set up for the corporation.

Q. When were the corporate books set up? A. I was requested to set them up February 1st, but I did not set them up until April 1st.

The Court: When did the corporation take over the business?

The Witness: It would be April 1st.

Q. By Mr. Mellinkoff: And prior to April 1st \$11,000 had been put in by Joseph and Morris Kaufman. A. Yes, and an additional fifteen came in before April 1st from Joseph Kaufman.

Q. An additional \$15,000? A. Yes, sir; there was \$26,000 at the date of incorporation." [R. pp. 99-100.]

"Q. By Mr. Mellinkoff: Now, taking this figure as it is without any further deductions at all, what portion of that gross sum would you say Max Kaufman would be entitled to under his agreement existing at the time? A. He would be entitled to 40 per cent of that profit.

Q. And on what basis do you give that answer? A. Well, the corporate setup was arranged that way, 40, 30, 30, and the first three months of operation were to be taken into consideration." [R. pp. 103-104.]

Concerning the profit realized by the enterprise during the months of January, February, and March, 1946, the following colloquy is pertinent [R. p. 105]:

"The Court: May I ask, was this \$9,000 distributed or was it simply kept in the business?

The Witness: It was kept in the business and was used in valuing the assets for the corporation. It was a definite factor in the transfer of the assets to the corporation."

Again, on cross-examination, the witness testified [R. pp. 107-109]:

"Q. By Mr. McCall: Mr. Asimow, when this money you spoke of a while ago—a while ago you

spoke of this money being put in escrow. That was put up by Joseph Kaufman, the \$6,000? A. That is right.

Q. That was actually not paid into the business—didn't go into this grocery business but went down here into the escrow title company, didn't it? A. Yes, I believe so.

Q. That was on the purchase—put up during the purchase of this property? A. In contemplation of the corporation expansion activities.

Q. Well, there was no corporation at that time, of course? A. Well, the corporation was in formation.

Q. What about the additional \$5,000? Did that go to the same place? A. No, that went into the business.

Q. Now, how do you mean that went into the business? A. A check was issued by Morris Kaufman and deposited by the Chicago Hotel and Restaurant Supply.

Q. To its bank account? A. That is right.

Q. Did you state to me a moment ago that this additional capital was not needed for the business but was needed to acquire that property? A. That is correct.

Q. That was what the capital was for? A. In anticipation of the corporation's requirements, building requirements.

The Court: A building to be used for the housing of the business?

The Witness: That is right.

The Court: And was the building in the name of the corporation?

The Witness: Yes. It went into escrow, I think, in November in the name of the corporation even before its actual charter issuance."



(ii) *Max Kaufman.*

In his so-called “The Facts” (App. Br. p. 37), appellant fixes the date of the removal of the wholesale business to new premises as October, 1946, *i. e.* three months before the trial date, January 10, 1947. This is but a half-truth, for the vital part of a meat business, the large cooler, was moved in April, 1946, approximately nine days after the corporate books were set up [R. p. 120]:

“Q. By Mr. Mellinkoff: Mr. Kaufman, when did you move your wholesale business from 925 Temple over to Fremont? A. Well, we moved it in three months.

Q. What about the cooler? A. We were using the cooler—using the cooler a long time.

Q. How long? A. As soon as got ready.

The Court: That doesn’t mean anything. When was it?

The Witness: About nine months.”

This testimony was clarified in the following [R. p. 98]:

“The Court: Will you ascertain that from your client?

Mr. Mellinkoff: I am informed, your Honor, that in so far as the large cooling room and this new location on Fremont, that that has been in use for approximately nine months and as far as bag and baggage every last vestige of the wholesale business that was moved was moved [*sic*] approximately three months ago.”

The appellee Kaufman's contemporaneous understanding of the new enterprise is well illustrated by his conversation with appellant, when the latter returned from service [R. pp. 122-123]:

"A. I said, 'Jack, I don't own this any more. It is a corporation. Probably the corporation will be effected maybe in a couple of weeks.' I didn't know how long it will take. And I asked my brother Morris, he is right there, how much should I—what kind of salary I should put on for Jack because he didn't have the job what we had before and the meat line was—we couldn't get meat. It was hard to get. It was rationing. So we just got that much. So Morris said, 'He is not a butcher. He can be a handy boy. He is a good boy when he wants to be and \$40.00 is the highest we can go.'

So I took in Jack. I said, 'Jack, they are going to allow you only \$40.00 from the business—the business belongs already to the corporation.' "

(iii) *Joseph Kaufman.*

Having testified that immediately after the terms of the new enterprise had been arranged (see *supra*, page 28) he had laid out money for the enterprise in the form of a check dated December 6, 1945 [R. p. 136], Joseph Kaufman testified that, in his absence, while he went to Chicago to liquidate his business there, his two brothers were managing the new enterprise. His testimony continued in part as follows [R. pp. 137-138]:

"The Court: And you have been interested in the business ever since?

The Witness: Yes, sir.

The Court: That is all the questions I care to hear from you.

Mr. Mellinkoff: I just want to ask one additional thing.

*“Direct Examination*

By Mr. Mellinkoff:

Q. Who actually built this new building? A. I did, sir.”

While appellant’s counsel on cross-examination attempted to show that the new enterprise was not established until April when the corporate books were set up, he failed, for such was not the fact [R. p. 138]:

“Q. Then you finally got all the business straightened out by April 1st to take over the store? A. The business was straightened out before I left. I would not leave if the business was not finished. The business was straightened out when I left. I will come back when I liquidate my business in Chicago and I come back. As far as money was concerned I told my brothers not to worry about it, I will finance it all the way through as much as we need for this kind of business and that he should be proud of what I had in mind about another business, manufacturing sausage.”

(iv) *Morris Kaufman.*

Having testified that he invested monies at the same time as Joseph Kaufman, *i. e.* prior to the incorporation, this witness’ examination continued as follows [R. pp. 140-141]:

“The Court: Did you put the \$5,000 in the business at that time?

The Witness: In the business and property all the way through.

The Court: At that time did you three men have an understanding that you were to have 30 per cent?

The Witness: Yes, sir.”

(v) *Walter Charles Richardson.*

Appellant lays great stress on the testimony of this witness as indicating that Max Kaufman remained the sole owner until the corporation books were established. But even assuming the brief testimony of the witness to be correct, it indicated nothing more than that he asked a leading question tantamount to: "Is this a corporation or are you the sole owner?" And that the appellee Kaufman took the latter alternative. If the question, instead had been: "Is this a corporation or a partnership?", appellee Kaufman—unschooled in legal terminology—would doubtless have again chosen the latter alternative.

In any event, appellee Kaufman denied the statement, and the trial court believed him [R. p. 131].

#### H. VALUATION OF CONTRIBUTIONS.

Appellant's specification of error in that portion of Finding VIII [R. p. 24] reading:

"Additional monies supplied by the three brothers has increased the capital investment in the corporation to approximately three times the value of the respondent Kaufman's former business."

is without merit. His argument on the point (App. Br. p. 69) can only be denominated fantastic. His argument on the question of valuation based on the profits of the new enterprise for the first three months of 1946, assumes true that which is completely false, *i. e.* that the profits were attributable solely to Max Kaufman, and not to the capital and energy already contributed by his partners. Appellant's fallacious assumption further ignores the fact that it was only because his brothers came to his rescue

that appellee Kaufman was able to remain in business at all.

The contribution to the new enterprise for which appellee Kaufman received a 40% interest was the assets of his former business. On this point, note the testimony of the witness Joseph Kaufman [R. p. 137]:

“The Court: Do you know how much your brother put in?

The Witness: Well, fortunately he could put in his assets—that was his assets in the business.”

There is no dispute that his brothers contributed cash, and the language of appellant’s brief at page 69 would indicate that even opposing counsel is now convinced that the contribution was for a present—not a future—interest in the business:

“For \$26,000, the two brothers acquired a 60% interest in a business which in three months earned \$9,295 profits. . . .”

The following colloquy between appellant’s counsel and the trial judge indicates the manner of valuation [R. pp. 112-113]:

“Mr. McCall: I am interested, your Honor, in—what I am trying to find out about is the total amount as compared to the amount of money that was put in here by the brothers.

The Court: If the stock was divided into certain proportions, one received 40 per cent and the other two 30 per cent each that would indicate the present ownership.”

The trial court correctly interpreted the meaning of “capital” and “capital stock” as declared by the Supreme Court of the State of California in *Dominguez Land*

*Corp. v. Daugherty*, 196 Cal. 468, 477, 238 Pac. 703 (1925).

The assets of the old business representing a 40% interest in the new, the capital investment, accurately computed, was then increased two-and-one-half ( $2\frac{1}{2}$ ) times over the capital of the former business. It is to be doubted that even appellant's counsel cares to quibble over the questionable distinction, if any, between the words "two-and-one-half times" and "approximately three times." If there is any difference, it is completely immaterial to the basic issue here involved, *i. e.* that in good faith, a new enterprise was created, different in form and substance from the employer's former business.

#### I. COMPLETION OF ORGANIZATION OF THE NEW ENTERPRISE.

The corporation planned in November [R. p. 100] or December [R. p. 136] of 1945, was incorporated well within ninety days thereafter, *i. e.* January 21, 1946. The articles of incorporation were filed in Los Angeles County January 24, 1946 [R. p. 148], and the corporation books were set up April 1, 1946 (App. Br. p. 41). It affirmatively appears that stock had been issued prior to the trial date, although the exact date of issuance is not in evidence [App. Br. p. 50; R. pp. 100, 113, 144, 148].

#### J. SUMMARY OF EVIDENCE ON CHANGE OF CIRCUMSTANCES.

It is submitted that irrespective of the precise legal name for the relationship which existed between appellee Kaufman and his two brothers after the agreement of November, 1945 (this discussed *infra*), the foregoing review of evidence demonstrates that there was in fact a

substantial change in the circumstances of the former employer, completely different from the mere changes of form which existed in all of the cases cited by appellant, as discussed, *supra*, page 15.

It is further submitted, that the former employer having in good faith disposed of his old business where appellant was formerly employed, it would have been and is unreasonable to compel re-employment. It likewise would have been and is unreasonable to compel employment by the new enterprise (in which substantial new capital had been invested in reliance on the contribution by appellee Kaufman) simply because the former employer held a minority interest in the new business. Such was the justified conclusion of the trial court.

**3. Legal Effect of Foregoing Facts on "Interim" Status of the New Enterprise: Neither the Former Employer Nor the Partnership Were Obligated to Employ Appellant.**

**A. "RUN AS A PARTNERSHIP."**

**(i) California Law Governs.**

The Finding of the trial court that it had been agreed that the business would be run as a partnership prior to incorporation, with a forty (40%) per cent interest in appellee Kaufman and a sixty (60%) per cent interest in his two brothers [portion of Finding VII, R. p. 24] as well as the companion Finding that "In January, 1946, appellee Kaufman neither owned nor controlled the business where petitioner was formerly employed" [portion of Finding IX, R. p. 24], under the rule of *Erie Railway Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188 (1938), must be tested by applicable California law. Therefore, to avoid unduly length-

ening this brief, of the cases cited by appellant on this subject, only those decided under California law will be discussed.

(ii) *Appellant's Cited Cases Holding "No Partnership."*

Appellant cites five cases decided under California law wherein the courts ruled that there was no partnership. Not one of these cases has any remote resemblance to the case at bar—on the facts, on principle, or on the law.

*Blanchard v. Kaull, et al.*, 44 Cal. 440, 451 (superseding 1 C. U. 665) (1872) (App. Br. p. 62), in its only mention of the question of partnership states:

"A partnership or a joint stock company is *not necessarily* the result of an abortive attempt to organize a corporation." (Italics added.)

The case does not hold that under such circumstances there cannot be a partnership, and the inference to be drawn is that partnership may often result under such circumstances.

*Smith, et al. v. Grove, et al.*, 47 Cal. App. (2d) 456, 118 P. (2d) 324 (1941), *Kersch v. Taber*, 67 Cal. App. (2d) 499, 154 P. (2d) 934 (1945), and *Wallace v. Pacific Electric Ry. Co., et al.*, 105 Cal. App. 664, 288 Pac. 834 (1930) (all at App. Br. p. 63), were all affirmances on appeal of lower court rulings of "no partnership." This, on the accepted principle of California law expressly stated in both the *Smith* and *Kersch Cases*, *supra*, that the determination of the question of existence or not of a partnership is for the trial court. *Smith, et al. v. Grove, et al.*, *supra*, at page 461, puts the matter thus:

" . . . and they argue earnestly that therefore the said instrument constitutes a partnership agree-



ment. We may not so hold. The trial court made a finding directly to the contrary. We are not at liberty to disturb that finding even though we disagreed with the trial court.”

In addition it is to be noted: In the *Smith Case*, *supra*, the agreement imposed on one party alone the burden of all expenses, the exact reverse of the factual situation in the case at bar. In *Wallace v. Pacific Electric Ry. Company, et al.*, *supra*, a negligence case, defendant company was held not liable as a partner of defendant express company which conducted its business in Pacific Electric cars, in exchange for a percent of the net proceeds. The business was conducted by the express company alone, the court saying at page 667:

“A sharing of profits is not the only test. There must be a community of interest in the business to constitute either a partnership or joint adventure.”

Can it be doubted that in the case at bar there was a genuine “community of interest,” where all the brothers contributed capital, one personally built the building to house the business, all contributed their personal services, and, in addition, all shared the profits in the agreed percentages?

*Kersch v. Taber*, *supra*, and *In re Mission Farms Dairy*, 9 Cir., 56 F. (2d) 346 (1932) (App. Br. p. 63), were both decided on the question of intent, the agreement in the latter case expressly excluding partnership, and on the further ground that monies were loaned rather than invested, and were simply to be repaid out of profits. In the *Mission Farms Dairy Case*, *supra*, promissory notes were given.

In the instant case there is not a scintilla of evidence that the money invested in the business was ever to be repaid in any form by anyone!

(iii) *Principles of Partnership Under California Law.*

The intention of the parties is the governing consideration (*Lusher v. Silver, et al.*, 70 Cal. App. (2d) 586, 588, 161 P. (2d) 472 (1945)). But that intent need not be expressed in a legal conclusion. As stated in *California Employment Stabilization Commission v. Walters, et al.*, 64 Cal. App. (2d) 554, 558, 149 P. (2d) 17 (1944):

“It is held, however, that the existence of a partnership may be established although the parties may not have used the words ‘partner’ or ‘partnership’; nor is it essential that the parties should have known that their contract in law created a partnership. (20 Cal. Jur. p. 686) It is the intent to do the things which constitute a partnership that usually determines whether or not that relationship exists between the parties.”

The receipts of profits is prima facie evidence of partnership (Civil Code of California, Section 2401 (4), App. Br. App. p. 3; *Lusher v. Silver, et al., supra*). Appellant asserts the profit-sharing in the case at bar was interest on a loan (App. Br. p. 64), but it is submitted that that assertion is totally lacking in evidentiary support. Due to the accountant's delay [R. p. 101] corporate books were not set up immediately, but profits were divided because it had been so agreed; “they would consider themselves as partners, as members of the business.” [R. p. 100].

Appellant likewise argues that there was no partnership because there was no proof of an agreement "to carry on the business as co-owners" (App. Br. p. 64). The law of California however, looks to substance and not form. No formalities are required (*Laughlin v. Haberfelde, et al.*, 72 Cal. App. (2d) 780, 786, 165 P. (2d) 544 (1946); *Niroad v. Farnell, et al.*, 11 Cal. App. 767, 106 Pac. 252 (1909)). The *Laughlin Case, supra*, decided after the adoption in California of the Uniform Partnership Law, declares:

" 'In *Niroad v. Farnell, supra*, the rule is stated in the syllabus, which is borne out by the text, 'the voluntary association of partners may be shown without proving an express agreement to form a partnership; and a finding of its existence may be based upon a rational consideration of the facts and declarations of the parties, warranting the inference that the parties understood that they were partners, and acted as such.' "

In the *Niroad Case, supra*, at page 770, there was testimony to this effect:

" 'She said she would advance the money for the engine, as the 'boys,' as she called it, were going in together.' "

In similar vein was the testimony of Joseph Kaufman. [R. p. 135]:

"The Witness: I said, 'Max, what is the use of being downhearted and being sick about it? We will go in. We will build up a new business, a real good, going business, and we will be proud of it and I will make you proud of the business that you are in right now,' and I am trying to do that, your Honor."

The fact that some of the brothers in the present case received salaries is no bar to a partnership relationship. By agreement, partners—or some of them—may receive such compensation. (*Nielsen v. Holmes, et al.*, 82 A. C. A. 342, 350, (1947)).

Once the partnership is established, “All the partners have equal rights in the management and conduct of the partnership business.” (Civil Code of California, Section 2412 (e)). Further, under Section 2412 (h) of the Civil Code of California:

“Any difference arising as to ordinary matters connected with the partnership may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners.”

Can it then be doubted that appellee Kaufman was legally unable to restore appellant against the wishes of his brothers? [R. p. 122, 123; App. Br. p. 6].

(iv) *The Partnership Was Not Obligated to Employ Appellant.*

Recognizing the weakness of his argument against existence of a partnership, appellant now urges that even if a partnership existed, it was bound by the “obligation” of the former employer. (App. Br. p. 59) This is the most specious and circular bit of reasoning in appellant’s entire argument.

The question of the existence of the “obligation” imposed by the Act is not to be decided by California cases involving liability of incoming partners for goods sold and delivered (*Wine Packing Corp. of Calif. v. Voss*, 37 Cal.

App. (2d) 528, 100 P. (2d) 325 (1940); *Kennedy & Shaw Lumber Co. v. Taylor, et al.*, 3 C. U. 697, 31 Pac. 1122 (1892); both cited, App. Br. p. 60). To assert that the partnership is bound is simply to assume the fact that is sought to be established by appellant, namely—that any obligation existed.

Appellant at once recognizes (App. Br. p. 60) and then proceeds to forget that the right to re-employment is not absolute (*Boston & M.R.R. v. Bentubo*, 1 Cir., 160 F. (2d) 326 (1947), cited, App. Br. p. 67), exists only by virtue of the Act, and exists only where the former employer's circumstances have not changed (as demonstrated above) so as to make such restoration impossible or unreasonable.

#### B. "PRE-INCORPORATION SUBSCRIBERS."

Even if it be assumed—as appellant urges (App. Br. p. 61)—that the brothers of appellee Kaufman were pre-incorporation subscribers for stock in a corporation to be formed, it would nonetheless be true that appellee Kaufman's circumstance had so changed as to make re-employment unreasonable.

Appellant concedes that a pre-incorporation subscription, though not reduced to writing is binding. (App. Br. p. 61). All the other conditions listed by appellant were complied with. (See, *supra*, page 38.)

If appellant's hypothesis were accepted, then appellee Kaufman had subscribed his business; the others—in reliance on that promise—had subscribed and paid their money. Under such circumstances, a fiduciary relationship would exist between appellee Kaufman and his broth-

ers analogous to that existing between partners (*Lomita Land and Water Company v. Robinson, et al.*, 154 Cal. 36, 97 Pac. 10, 18 L. R. A. (N. S.) 1106 (1908)). And he would no longer be free to deal with the business, except for the promised purpose. (*Detwiler v. Clune*, 77 Cal. App. 562, 247 Pac. 264 (1926)).

**4. Legal Effect of Foregoing Facts on the Corporation:  
The Corporation Was Not Obligated to Employ Ap-  
pellant.**

On reviewing all the evidence, the trial court concluded:

“Respondent corporation is an independent business entity without obligation to employ petitioner.” [Conclusions of Law, 4, R. p. 25.]

For appellant to argue that “The Appellee Corporation Is Merely an Incorporated Continuance of Max Kaufman’s Business, Under The Same Management;” (App. Br. p. 50) is completely contrary to the facts of the case; unsupported by the decisions of federal courts, including those cited by appellant; and completely disregards the pertinent California decisions on the subject of “alter ego.”

It is admitted by appellant that appellee Kaufman owns only forty (40%) percent of the stock of the corporation, (App. Br. p. 50), whereas as a pre-service employer he owned one hundred (100%) percent of the old business.

In every one of the re-employment cases cited by appellant on the subject, there was a change merely in form of the employer, without any change of ownership. (See discussion, *supra*, page 15 of *Trailmobile Co., et al. v. Whirls*, 6 Cir., 154 F. (2d) 866 (1946); *Sullivan v. Mil-*

*ner Hotel Co., et al.*, D. C., E. D. Mich., S. D., 66 F. Supp. 607, 610 (1946); *Karas v. Klein, et al.*, D. C., D. Minn., 3rd Div., 70 F. Supp. 469, 472 (1947); and *Brown v. Luster, et al.*, 9 Cir., No. 11,544 (1947).)

In *Brown v. Luster, et al.*, *supra*, this court at page 6, uses language peculiarly appropriate to the present case:

“It is clear, too, that though the legislation in question is to be liberally construed for the benefit of the veteran it aims to apply its provisions to the existing relationship before induction and not to impose upon one person a liability toward another to whom there was no previous liability. (*Cf. Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U. S. 275, 285.)”

Even the cases arising under the National Labor Relations Act, mentioned by appellant (App. Br. p. 66), do not sustain the proposition for which they are cited.

Appellant cannot seriously contend that “Under the National Labor Relations Act, this corporation would have been recognized as identical with Kaufman” (App. Br. p. 66), a forty (40%) per cent stockholder, when in *N.L.R.B. v. Adel Clay Products Co.*, 8 Cir., 134 F. (2d) 342 (1943), the corporation was owned 100% by the former employers; *N.L.R.B. v. Federal Engineering Co., Inc., et al.*, 6 Cir., 153 F. (2d) 233 (1946) the corporation was likewise owned one hundred (100%) percent by the former employers; and in *N.L.R.B. v. Hearst, et al.*, 9 Cir., 102 F. (2d) 658, 663 (1939) despite a closely interlocking

ownership, this Court *refused* to order reinstatement as against corporations which had not been direct employers:

“However that may be, we hold that the respondents, other than Hearst Publications, Inc., and King Features Syndicate, Inc., were not the employers of the men in question; they cannot be compelled to reinstate such men, or to pay them back pay.”

Mere knowledge of the fact that a veteran had been employed in the former business is clearly insufficient to impose on the corporation a non-existent re-employment obligation. (*Hastings v. Reynolds Metals Co.*, *supra*; *Newman v. Finer*, *supra*).

The Act does not affect the assets of the former business with a lien which carries over to the new ownership. (*McFadden v. Dienelt, et al.*, D. C., N. D., Calif., S. D. 68 F. Supp. 951 (1946)).

In order to disregard the corporate entity and treat the corporation as being identical with the former employer, two factors, both non-existent in this case, are required under California law:

(1) Not mere influence, but such a complete unity of interest and ownership that separation of the individual and the corporation has ceased. (*Minifie v. Rowley*, 187 Cal. 481, 487, 202 Pac. 673 (1921)). Whereas in the case at bar appellee Kaufman owned only forty (40%) percent of the stock of the corporation, it has been held that an allegation of *majority* stock ownership is insufficient to establish *alter ego*. (*Dos Pueblos Ranch & Improvement Company v. Ellis, et al.*, 8 Cal. (2d) 617, 622, 67 P.(2d) 340 (1937)).



(2) It must be proved that some species of fraud or injustice exists, and to this end "Bad faith in one form or another must be shown before the court may disregard the fiction of separate corporate existence." (*Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, Incorporated*, 217 Cal. 124, 129, 17 P.(2d) 709 (1932)). As pointed out, *supra* (page 29), the trial court was impressed by the bona fides of appellee Kaufman, and *undisputed* Finding VI [R. pp. 23, 24] clearly proves it.

### 5. Conclusion.

Under federal and state law, as applied to the facts, there was such a change of circumstances as to render re-employment unreasonable. For compelling business reasons, the former employer gave up his former business, and acquired a minority interest in a new enterprise. He did not control the new enterprise, which declined—and could not be compelled—to employ the appellant at his former job.

## POINT IV.

Appellant Made No Application For Re-Employment  
In His Former Position, Or a Position of Like  
Seniority, Status, and Pay Within Ninety Days  
After His Discharge from the Military Service.

### 1. Nature of the Provision.

#### A. CONDITION PRECEDENT TO RIGHT TO REQUIRE RE-EMPLOYMENT.

The wording of the pertinent provision of the Act indicates that application within the statutory period is a condition precedent to the right to require re-employment:

“In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) *makes application for re-employment within ninety days after he is relieved from such training and service . . .*” (portion of Section 8(b)).

Even “liberal construction” cannot remove the provision from the Act. (*Cox v. Boston Consolidated Gas Co.*, 1 Cir., 161 F. (2d) 680 (1947)).

#### B. THERE MUST BE A BONA FIDE EFFORT TO SECURE RE-EMPLOYMENT IN THE FORMER JOB.

*Lawson v. Armour & Company*, 11 C. C. H. Lab. Cases 69,639, Par. 63, 302 D. C., N. D. Ga., Atlanta Div. (1946).

C. TRIAL COURT TO DETERMINE CONTESTED QUESTION OF FACT AS TO WHETHER OR NOT DEFINITE APPLICATION WAS MADE.

*Van Doren v. Van Doren Laundry Service, Inc.*,  
3 Cir., 162 F. (2d) 1007, 1009 (1947).

2. Essential Facts Concerning Failure to Make Timely Application.

A. WHEN APPELLANT RETURNED FROM SERVICE THE FORMER EMPLOYER'S CIRCUMSTANCES HAD ALREADY COMPLETELY CHANGED, AND THERE WAS A NEW OWNERSHIP. (See *supra*, page 17 *et seq.*)

B. HE WAS GIVEN A FULL EXPLANATION OF THE CHANGED CIRCUMSTANCES AND THE NEW OWNERSHIP; AND MADE NO APPLICATION FOR RE-EMPLOYMENT IN HIS FORMER POSITION, OR A POSITION OF LIKE SENIORITY, STATUS, AND PAY.

(i) *Max Kaufman.*

“Q. By Mr. Mellinkoff: Now, Mr. Kaufman, when Gimpelson came back from the Army do you recall what if any conversation you had when he first started back to work for you? A. When Gimpelson came back I just opened my arms like a father. I explained to him every bit of it. I put a lot of work in Gimpelson because he never made a living, you know.

Q. Now don't go into that. A. Excuse me. I don't go into it. I was trying to—he should remain in this business. I explained him. I said, ‘Jack, the state got the real estate. In fact, I don't have to tell you. You are the one who wanted the coolers from me.’

Q. Mr. Kaufman, just tell the court what conversation you had with Jack when he came back. A. I said, 'Jack, I don't own this any more. It is a corporation. Probably the corporation will be effected maybe in a couple of weeks.' I didn't know how long it will take. And I asked my brother Morris, he is right there, how much should I—what kind of salary I should put on for Jack because he didn't have the job what we had before and the meat line was—we couldn't get meat. It was hard to get. It was rationing. So we just got that much. So Morris said, 'He is not a butcher. He can be a handy boy. He is a good boy when he wants to be and \$40.00 is the highest we can go.'

So I took in Jack. I said, 'Jack, they are going to allow you only \$40.00 from the business—the business belongs already to the corporation.' My brother—we started in before January yet this is in December. 'I will give you \$25.00 from my own pocket. I want you to be satisfied and then we will build up the new plant. We will probably be able to give you a job that will fit you better in it,' and with the same proposition I came to Mr. Mellinkoff." [R. pp. 122-123.]

Appellant argues that appellee Kaufman thus made a deliberate misstatement of fact when he said "'Jack, I don't own this any more.'" It is submitted, however, that in view of the circumstances which existed (see *supra*, page 17 *et seq.*), appellee Kaufman was describing the situation as accurately as any non-lawyer could be expected to do, exactly as he understood it, and precisely in accord with the legal effect of his agreement with his brothers. Moreover, he was doing what in fairness, and in law, he

should have done, i.e. explain the new conditions. As stated in the wrongful discharge case of *Hoyer v. United Dressed Beef Co., Inc., et al.*, D. C., S. D. Calif., C. D., 67 F. Supp. 730, 733 (1946):

“But the employer should have thought of this when he re-employed him. They knew the changed conditions. The plaintiff was restored to his former job, and no new conditions were attached to it.”

(ii) *Jacob S. Gimpelson.*

In response to a leading question from his counsel, appellant testified that some time after he was discharged from the service he made application for re-employment [R. p. 41]. However, he not only failed to specify exactly when or how he made the application, but his later testimony on the subject was so completely contrary to such testimony, and so completely foreign to practical human experience as to be incredible. And, the trial court did not believe him. (See *supra*, page 11.)

He testified that at his first post-service conference with his former employer “practically all the help” in the business were present [R. p. 60], yet he failed to call a single witness to corroborate his testimony as to what occurred. He testified that neither he [R. p. 44] nor anyone else [R. p. 61] said anything about how much money he was to get; the so-called former job as “general manager” was not mentioned, and he was simply told “to go to work and work with Morris” [R. p. 66]; there was no talk about

getting his “old job back” [R. p. 72]; and there was no mention of his so-called former “profit sharing deal” [R. pp. 61, 71].

On the other hand, on cross-examination, he reluctantly corroborated a large part of appellee Kaufman’s testimony as to the explanation of the changed circumstances of the business. Among other things he admitted that he was told new money had already been put into the business and that more new capital was to follow. [R. pp. 61-63.]

C. APPELLANT WAS EMPLOYED BY THE NEW OWNERSHIP IN A POSITION DIFFERENT IN SENIORITY, STATUS, AND PAY.

Appellant concedes that he was employed in a different position than he had formerly held. (App. Br. p. 25).

The pay also was different, but requires some clarification: Exclusive of any question of profits, the highest pay appellant had received from his former employer before appellant’s military service was \$35.00 per week, and that only for the last seven months of his employment [R. p. 54]. Because he was selling and using an automobile he received a \$15.00 per week expense account [R. p. 54] but this, appellant did not consider income [R. p. 77]. In the pre-service settlement of his percentage arrangement he received approximately \$2500.00 [R. p. 93].

When appellant was employed by the new ownership he received \$40.00 per week from the new business [R. p. 44]

and \$25.00 per week from appellee Kaufman personally [R. p. 123], or a total of \$65.00 per week. (Appellant denied receiving this extra \$25.00 weekly, but the trial court did not believe him.) Later the compensation from the new business was increased to \$55.00 per week [R. p. 66], making a total of \$80.00 per week as against basic pre-service compensation of \$35.00 per week.

D. APPELLANT MADE NO OBJECTION TO THIS NEW EMPLOYMENT UNTIL AFTER THE EXPIRATION OF THE STATUTORY PERIOD FOR MAKING APPLICATION FOR RE-EMPLOYMENT.

The appellant was discharged from the service on November 6, 1945 [*undisputed* Finding III, R. p. 23]. The statutory period of making application for re-employment expired February 6, 1946.

Appellee Kaufman testified that until March appellant “was satisfied,” and that in that month appellant “started to fight with my brothers” [R. p. 123]. Later appellant quit and was re-employed, and finally—after threatening appellee Kaufman—walked out [R. p. 125].

Aside from the fact that he admitted making no objection to the new employment arrangement when he was first employed (see *supra*, page 53) appellant likewise admitted that when he first started getting the new pay, he made neither objection nor comment [R. p. 64]. He further admitted on cross-examination that he made no objection to the basic salary, nor mention of the “percentage deal” until the middle of February [R. p. 65]—*after* the expiration of the statutory period.

**3. Legal Effect of Appellant's Conduct: He Failed to Make Timely Application for Reemployment and Waived Any Rights Under the Act.**

**A. THE FACTS DO NOT SHOW TIMELY APPLICATION AND APPELLANT'S CONDUCT WAS INCONSISTENT WITH SUCH AN ASSERTION:**

*Appellant's Cases.*

In *Dodds v. Williams*, D. C., D. Arizona, 68 F. Supp. 995 (1946), aff'd. *Williams v. Dodds*, 9 Cir. No. 11,526 (1947), cited by appellant (App. Br. p. 53), the veteran made timely application for re-employment orally and in writing, was refused, was offered a different job, rejected the same, and sued.

In *Levine v. Berman*, 7 Cir., 161 F. (2d) 386 (1947), cited by appellant (App. Br. pp. 55, 65), the veteran made application for re-employment the day after discharge, was refused, was offered a different job, rejected the same, and sued.

In *Salter v. Becker Roofing Co.*, D. C., M. D., Alabama, N. D., 65 F. Supp. 633 (1946), cited by appellant (App. Br. pp. 53, 55) the veteran made timely written application, was offered a different job, rejected the same, and sued.

In *Brown v. Luster, et al.*, 9 Cir., No. 11,544 (1947), cited by appellant (App. Br. p. 66), the veteran made timely application for re-employment, was refused, was offered a different job, rejected the same, and sued.

Not so, appellant Gimpelson!



B. APPELLANT WAIVED "RE-EMPLOYMENT."

There has been no showing in this case of a bona fide effort to secure re-employment prior to the expiration of the statutory period. On the contrary, the appellant voluntarily accepted a completely different employment. Under such circumstances, it is held that the veteran waives his rights under the Act.

*Lawson v. Armour & Company, supra;*

*Hastings v. Reynolds Metals Company, supra.*

If the question of waiver is to be decided other than by federal court interpretation of a federal statute, then it must be determined by the law of the State of California. As stated in *Medico-Dental Building Company of Los Angeles v. Horton & Converse*, 21 Cal. (2d) 411, 432, 132 P. (2d) 457 on hearing after 51 A. C. A. 23, 124 P. (2d) 56 (1942):

"Waiver may be shown by conduct; and it may be the result of an act, which, according to its natural import, is so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that such right has been relinquished."

As demonstrated by the facts, the appellant knew of the changed circumstances, knew that he was not getting his old job back, knew that fresh money had been put into the business, knew that additional money was coming in furtherance of the agreement between the three owners, and lastly: knew or should have known that the new money would not come in if it were suddenly learned that appellant claimed an interest in the business! Under such circumstances, it was appellant's duty, if he were

ever to assert a claim to a percentage of the profits of the business, to speak up. He failed to do so. And, instead, accepted employment in the new business and accepted the proffered salary, thus following a course of conduct "so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that such right has been relinquished."

Appellant knew that, under the then existing circumstances, so changed from the pre-service individual ownership of appellee Kaufman, he was not entitled in law or otherwise to a percentage of the profits of the business. He decided it was a good proposition, with a basic salary of \$80.00 per week as against his pre-service salary of \$35.00 per week. There was opportunity for advancement. If materials and a priority could have been obtained by the new enterprise [R. p. 139], an additional business would have been built up. He went to work. And in mid-February (according to appellant's own testimony), or in March (according to appellee Kaufman)—after \$26,000 of new money had been invested in the business—for the first time since his discharge from the service on November 6, 1945, he commenced to raise objections, fight with the owners of the business and threaten appellee Kaufman with "OPA."

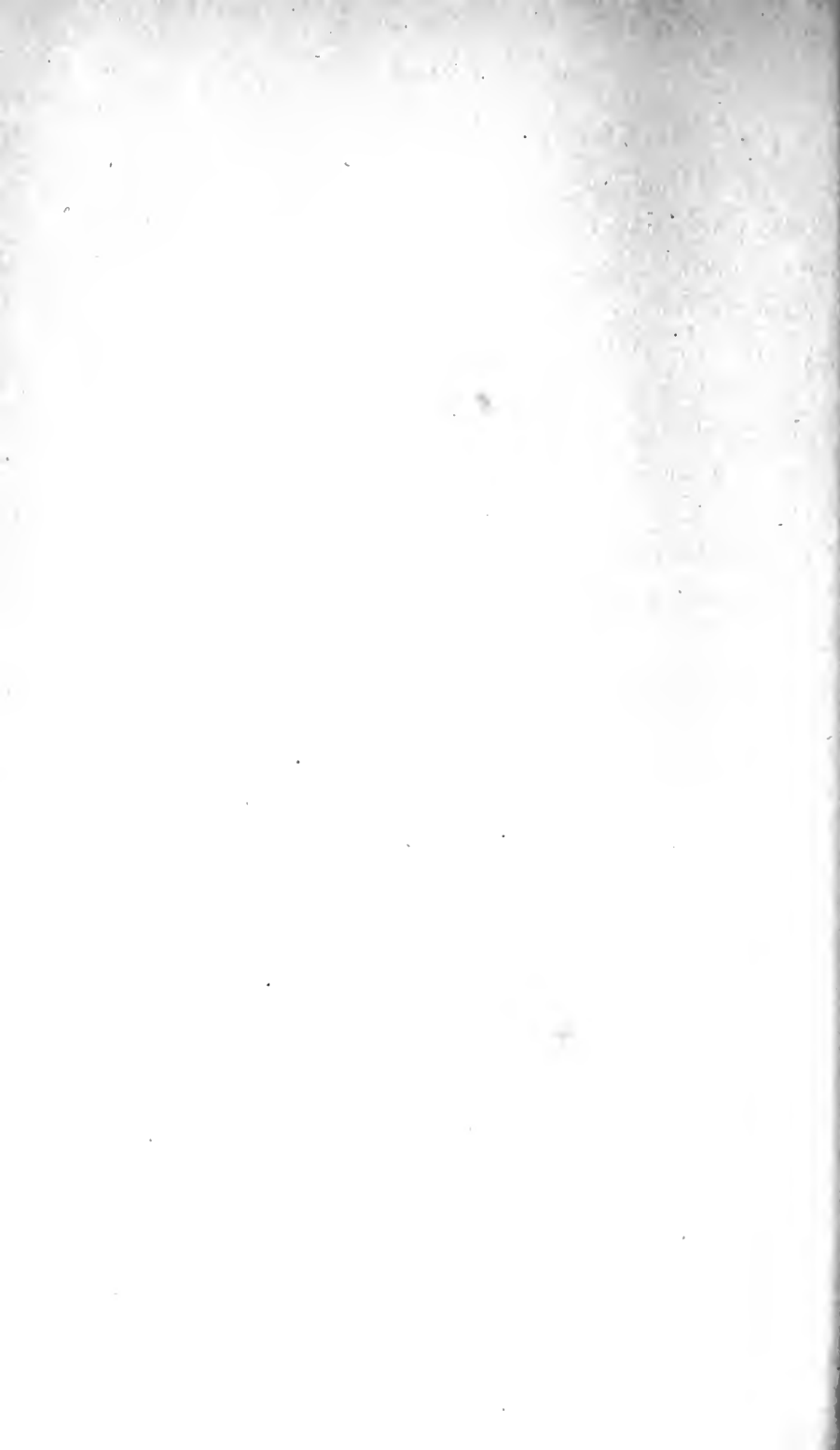
Whether it be called "waiver" (as in the federal cases decided under the Act and the California Supreme Court case cited, *supra*,) or "laches," the facts disclose a situation of the manifest "inequity of permitting a claim to be enforced." (*Winn, et al. v. Shugart, et al.*, 10 Cir., 112 F. (2d) 617 (1940); erroneously cited by appellant as being a decision of this Court (App. Br. p. 58).

### Conclusion.

It is submitted that appellant has not sustained the burden of showing that the disputed Findings are “clearly erroneous”; that the Findings are supported by substantial evidence and are clearly correct; that the District Court properly concluded that the employer’s circumstances have so changed as to make restoration unreasonable, that appellee corporation is an independent business entity without obligation to employ appellant, and that appellant made no application for re-employment within the statutory period. The judgment of the District Court should be affirmed.

Respectfully submitted,

HERZBRUN & CHANTRY and  
DAVID MELLINKOFF,  
*Attorneys for Appellees.*



**No. 11661**  
**IN THE**  
**United States Circuit Court of Appeals**  
**FOR THE NINTH CIRCUIT**

---

HOME INDEMNITY COMPANY OF NEW YORK,  
Appellant,

vs.

STANDARD ACCIDENT INSURANCE COMPANY  
OF DETROIT; GEORGE WHITE; JAMES CARL  
FITZGERALD; JAMES RICHARD OSBORNE;  
MICHAEL LEE and PATRICIA LEE,

Appellees.

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**TRANSCRIPT OF RECORD**

(In Two Volumes)

**VOLUME I**

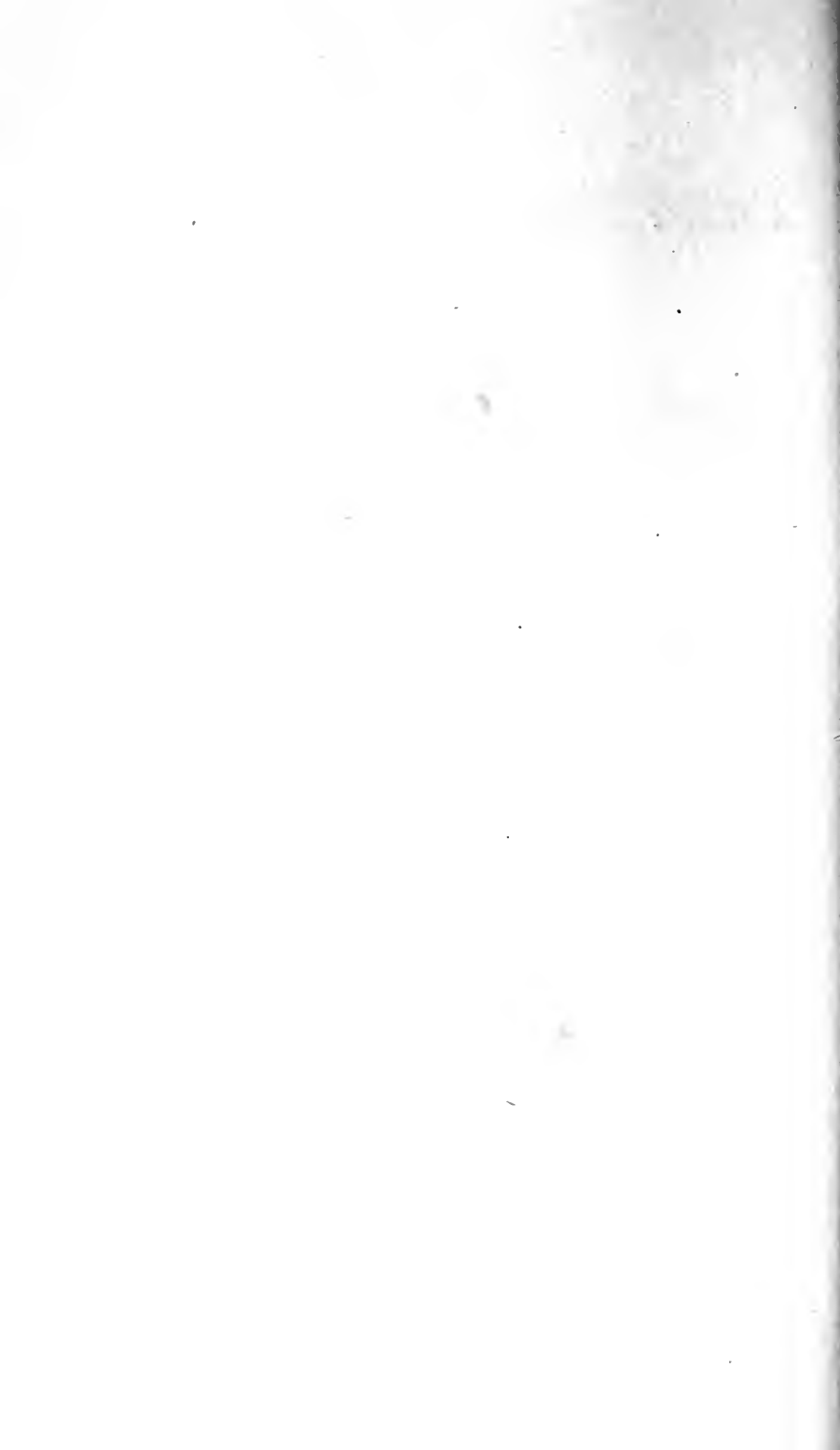
(Pages 1 to 234, Inclusive)

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

FILED

SEP 13 1947

PAUL P. O'BRIEN



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## NAMES AND ADDRESSES OF ATTORNEYS:

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San Diego 1, Calif. [1\*]

In the District Court of the United States  
Southern District of California  
Central Division

No. 5729-OC In Equity

STANDARD ACCIDENT INSURANCE COMPANY  
OF DETROIT, a corporation,

Plaintiff,

vs.

HOME INDEMNITY COMPANY OF NEW YORK,  
a corporation, GEORGE WHITE, JAMES CARL  
FITZGERALD, JAMES RICHARD OSBORNE,  
MICHAEL LEE and PATRICIA LEE,

Defendants.

### COMPLAINT FOR DECLARATORY RELIEF

For cause of action plaintiff alleges:

#### I.

That this court has jurisdiction over the above entitled action by reason of the following facts, the particulars of which are hereinafter more fully alleged: a diversity of citizenship exists between plaintiff and each of the defendants, and the amount involved in this action is in excess of \$3,000.00, exclusive of interest and costs of suit.

#### II.

That the plaintiff is now, and at all the times herein mentioned was, a corporation organized and existing under and by [2] virtue of the laws of the State of Michigan, and was and is a citizen of the State of Michigan, and is now and was at all times hereinafter mentioned

authorized to do business in the State of California and to write policies of automobile liability insurance in said state, and was and is actually engaged in the business of writing said policies within said State of California at all of the times hereinafter mentioned.

### III.

That the defendant, Home Indemnity Company of New York, is now, and at all of the times hereinafter mentioned was, a corporation duly organized under the laws of the State of New York, and is and was at all of the times hereinafter mentioned a citizen of the State of New York, and is and at all times herein mentioned was authorized to and actually engaged in business in the States of Nevada and California, and authorized in said states to write policies of automobile liability insurance.

### IV.

That the defendants, George White, James Carl Fitzgerald, James Richard Osborne, Michael Lee and Patricia Lee, and each of them, are now and were at all times hereinafter mentioned, residents and citizens of the State of California, residing in the Southern Judicial District of said state.

### V.

That plaintiff is informed and believes, and therefore alleges, that the North Lumberland Mining Company, a corporation, hereinafter mentioned, is, and at all times hereinafter mentioned was, a citizen and resident of the State of Nevada, and is not within the jurisdiction of this court, and for that reason has not been made a party to this cause.

## VI.

That by reason of the facts hereinbefore alleged there is a diversity of citizenship between plaintiff and all of the [3] defendants above named.

## VII.

That the amount in controversy in this action exceeds the sum of \$3,000.00, exclusive of interest and costs.

## VIII.

That plaintiff is informed and believes, and upon such information and belief alleges, that on and prior to the 20th day of July, 1946, the aforesaid North Lumberland Mining Company was the owner of a certain Lincoln Zephyr automobile, and that prior to said 20th day of July, 1946, the exact date being unknown to this plaintiff, the defendant, Home Indemnity Company of New York, issued in the State of Nevada to said North Lumberland Mining Company its policy of automobile liability insurance, which said policy was in full force and effect on the 20th day of July, 1946, and at the time of the accident hereinafter described.

## IX.

That plaintiff is informed and believes, and upon such information and belief alleges, that said Home Indemnity Company of New York did, by the terms of said policy, agree that it would pay all sums, not exceeding \$100,000.00 for the injury or death of one person or \$300,000.00 for the injury or death of more than one person in the same accident, which said North Lumberland Mining Company, or any person using or operating said Lincoln Zephyr automobile with the permission of said North Lumberland Mining Company, should become ob-



ligated to pay by reason of the liability imposed upon them, or either of them, by law for damages on account of bodily injury or death at any time resulting from or suffered, or alleged to have been suffered, by any person or persons due to any accident as result of the ownership, use, operation or maintenance of said Lincoln Zephyr automobile; and that the said Home Indemnity Company of New York, under the terms of said policy, did further agree that it would, at its own cost and expense, investigate all accidents alleged to have [4] occurred as result of the operation of said Lincoln Zephyr automobile, and would, at its own cost and expense, defend and care for on behalf of each person assured under said policy all suits or actions at law brought as result of any such accident, even if groundless.

## X.

That plaintiff is informed and believes, and upon such information and belief alleges, the fact to be that said policy of insurance issued by defendant, Home Indemnity Company of New York, as aforesaid, was substantially in the same form as the policy of insurance issued by this plaintiff as hereinafter alleged, which is annexed hereto and made a part of this complaint and marked Exhibit A, except that the amount of coverage and the name of the person named as assured and the automobile as to which said insurance was issued were different.

## XI.

That on or about the 29th day of September, 1945, this plaintiff issued to the defendant, George White, in the State of California, a certain policy of automobile liability insurance, wherein and whereby this plaintiff agreed to pay, on behalf of said George White, all sums

which he should become obligated to pay by reason of the liability imposed upon him by law for damages because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident arising out of the ownership, maintenance or use of a certain 1942 Packard five-passenger convertible coupe, not exceeding however the sum of \$25,000.00 for the bodily injury or death of one person, or \$50,000.00 for more than one person injured or killed in one accident.

## XII.

That by the terms of said policy this plaintiff further agreed that if the automobile described in said policy issued by it to the defendant, George White, should be withdrawn from normal use [5] because of its breakdown, repair, servicing, loss or destruction, the insurance afforded by said policy with respect to the automobile described therein should apply with respect to any other automobile not owned by said George White while temporarily used as a substitute for the automobile described in said policy, but that by the terms of said policy it was further provided that such insurance as to the use of said substituted automobile should be excess insurance over any other valid and collectible insurance available to said George White under a policy applicable with respect to the substituted automobile or otherwise against loss covered by either or both of said insuring agreements; that a photostatic copy of said policy issued by this plaintiff is annexed hereto, made a part hereof, and marked Exhibit A.

## XIII.

That plaintiff is informed by the defendant George White, and upon such information believes and alleges the fact to be, that on the 20th day of July, 1946, the Packard automobile described in the policy of insurance annexed hereto, made a part hereof and marked Exhibit A, was withdrawn from normal use because of breakdown or repair, and this plaintiff is further informed and believes, and upon such information and belief alleges, that on said 20th day of July, 1946, and while said Packard automobile was broken down and under repair, defendant George White was driving the aforesaid Lincoln Zephyr automobile, the property of defendant North Lumberland Mining Company, in the County of San Diego, State of California, with the consent of said North Lumberland Mining Company, and did then run into and collide with one Claude McLester Lee and one Leana Mae Osborne Lee, and as result of the injuries sustained in said collision said Claude McLester Lee and said Leana Mae Osborne Lee died.

## XIV.

That the defendants, Michael Lee and Patricia Lee, did, on or about the 6th day of August, 1946, commence an action in the [6] Superior Court of the State of California, in and for the County of San Diego, entitled, "Michael Lee, a minor, and Patricia Lee, a minor, by Mildred E. Taylor, their Guardian ad litem, Plaintiffs vs. George White, John Doe and Doe Corporation, a corporation, Defendants," being action No. 134918 in said court, and that in the complaint filed by them in said action they alleged that they are the children of said Claude McLester Lee and his sole surviving heirs-at-

law; that the death of said Claude McLester Lee was caused by the carelessness and negligence of the defendant, George White, in the operation of the Lincoln Zephyr automobile hereinbefore described, and that by reason of the death of said Claude McLester Lee they have been damaged in the sum of \$50,000.00; and that said action is now pending.

### XV.

That the defendants, James Carl Fitzgerald and James Richard Osborne, commenced an action in the Superior Court of the State of California, in and for the County of San Diego, entitled, "James Carl Fitzgerald, a minor, by and through his Guardian ad litem, James Richard Osborne, and James Richard Osborne, Plaintiffs vs. George White and North Lumberland Mining Company, Defendants," being action No. 134630 in said court, wherein they allege that defendant James Carl Fitzgerald is the son of the aforesaid Leana Mae Osborne Lee, and that James Richard Osborne is the father of said Leana Mae Osborne Lee, and that said James Carl Fitzgerald is the sole heir-at-law of said Leana Mae Osborne Lee, and allege that the death of said Leana Mae Osborne Lee was caused in the accident hereinbefore described by the negligence of defendant, George White, in the operation of the Lincoln Zephyr automobile hereinbefore described, and that he was driving the same with the knowledge and consent of said North Lumberland Mining Company, and allege that by reason of the death of said Leana Mae Osborne Lee said James Carl Fitzgerald has been damaged in the sum of \$50,000.00, and that said James Richard Osborne has incurred and been obliged to pay for the burial [7] of Leana Mae Os-

borne Lee the sum of \$500.00, and by reason thereof has been damaged in that amount, and that said action is now pending.

## XVI.

That the defense of said actions No. 134918 and No. 134630 was, by the defendant George White, tendered to defendant, Home Indemnity Company of New York, and that said Home Indemnity Company of New York did accept the defense of said actions, and did employ an attorney, to wit, one Thomas P. Menzies, to defend each of said actions on behalf of defendant George White herein, but that said defendant, Home Indemnity Company of New York, does now deny any liability to defendant George White under its policy of insurance issued to said Northumberland Mining Company, and refuses to further defend or cause to be defended said George White in said actions, or either of them. Plaintiff is informed and believes, and therefore alleges, that said defendant, Home Indemnity Company of New York, will refuse to pay any judgment that may be rendered in said action No. 134918 or in said action No. 134630 against defendant herein, George White, or to pay any part of any such judgments, or to in anywise perform any of the terms or conditions of the policy of insurance issued by it as aforesaid.

## XVII.

That out of and by reason of the facts, contracts and transactions hereinbefore alleged and described, an actual controversy has arisen by and between plaintiff and defendant, Home Indemnity Company of New York, the plaintiff and defendant George White, and defendants Home Indemnity Company of New York and George

White, as to the rights and duties of the plaintiff and defendant, Home Indemnity Company of New York, concerning their respective obligations to defend, on behalf of defendant George White, said action No. 134918 and said action No. 134630, and in regard to the respective liabilities of the plaintiff and defendant, Home Indemnity Company of New York, to pay any judgments that may be rendered in said actions, or either of [8] them, against the defendant George White.

That this plaintiff is informed and believes, and upon such information and belief alleges the fact to be, that the defendant, Home Indemnity Company of New York, contends that defendant George White, in reporting to it the accident hereinbefore described, denied that the Lincoln Zephyr automobile driven by him as aforesaid had collided with said Claude McLester Lee or said Leana Mae Osborne Lee, but that he thereafter admitted that said automobile had struck said persons and refused to verify answers to the complaints in said actions No. 134918 and No. 134630 submitted to him by the said counsel employed by Home Indemnity Company of New York, as aforesaid, and by which said answers said defendant, George White, would under oath have denied that the automobile driven by him collided with said persons; and that said Home Indemnity Company of New York contends that by reason of the facts last hereinbefore alleged said George White breached the conditions of the policy of insurance issued by it, as aforesaid, and that by reason of such breach it has been excused from the performance as to George White of its obligations under its policy of insurance issued by it as aforesaid, and is not obligated to defend said actions, or either of them, or to pay any judgment or judgments that may be

rendered in said actions against said George White; that said Home Indemnity Company of New York further contends that if its policy is in force and effect and it is obligated thereunder to the defendant George White, that its policy and the policy issued by this plaintiff, as aforesaid, constitute concurrent insurance, and that it and this plaintiff are equally obligated to pay the expense of the defense of said actions against said George White, and are each obligated to pay that portion of any judgments rendered in said actions No. 134918 and No. 134630 against said George White which the amount of the policy issued by them, respectively, bears to the total amount of the effective insurance under said policies. [9]

That plaintiff is informed and believes, and upon such information and belief alleges, that the defendant, George White, contends that he has fully complied with all of the terms and conditions of said policy of insurance issued by defendant, Home Indemnity Company of New York, as aforesaid, and has not breached any of the terms or conditions thereof, and that said policy constitutes primary insurance against the claims of the plaintiffs in said actions No. 134918 and No. 134630, and that the defendant, Home Indemnity Company of New York, is obligated to defend said actions on his behalf and pay any judgments rendered against him therein up to but not exceeding the limits of liability set forth in said policy; but further contends that if he did breach said policy, said breach was unsubstantial and did not in anywise prejudice the defendant, Home Indemnity Company of New York, and further contends that if he did breach said policy and that by reason of said breach Home Indemnity Company of New York had been so executed from its obligations to him under said policy, that then

this plaintiff is obligated to defend said actions on his behalf and to pay any judgments rendered against him in said actions No. 134918 and No. 134630, not exceeding the limits of liability of the policy issued by this plaintiff.

That this plaintiff contends that the policy issued by Home Indemnity Company of New York is in full force and effect and is primary coverage, and that said defendant, Home Indemnity Company of New York, is obligated to undertake and at its own expense pay for the investigation of the accident hereinbefore described and the defense of the said actions against George White, and pay any judgments that may be rendered against George White until its limits of liability hereinbefore described have been exhausted, and that the policy of this plaintiff constitutes excess insurance only, and that this plaintiff is not obligated to defend said actions or to pay any judgments that may be rendered therein, except so much of [10] said judgments as may be in excess of the limits of liability of the policy issued by defendant Home Indemnity Company of New York. This plaintiff further contends that if defendant, George White, did after the occurrence of the accident hereinbefore described breach the terms of the policy issued by the defendant, Home Indemnity Company of New York, as aforesaid, on his part to be performed, and did thereby release and excuse Home Indemnity Company of New York from its obligations under said policy, that then defendant, George White, is obligated to pay the expense of the defense of said actions and to pay any judgments



rendered against him therein up to, but not beyond, the amounts which, except for said breach of said policy, Home Indemnity Company of New York would have been obligated to pay, and that this plaintiff is not obligated to defend said actions or to pay any portion of said judgments, except so much thereof (not exceeding the limits of the policy issued by it) as shall be in excess of \$100,000.00 as to any one of the plaintiffs, and \$300,000.00 for all of the plaintiffs in said actions No. 134918 and No. 134630.

#### XVIII.

That the defendants, James Carl Fitzgerald, James Richard Osborne, Michael Lee and Patricia Lee, are parties interested in and directly affected by the controversies hereinbefore alleged, and that they, and each of them, are joined in this action because of their said interest in said controversies, but that this plaintiff does not know what, if any, contentions are made by said defendants, or any of them, with reference to said controversies.

#### XIX.

That plaintiff has commenced this action and makes the allegations hereinbefore set forth in good faith, and believing that defendant, George White, has fully and truly stated to it all of the facts known to him relating to the accident described in the complaint on file herein, and that said George White will and is willing [11] to cooperate with plaintiff or the defendant, Home Indemnity Company of New York, whichever in the judgment of

this court is obligated to defend the defendant, George White, in said actions No. 134918 and No. 134630; and this plaintiff does not waive any defenses that it may have to any claims made against it upon its said policy if said George White has given to this plaintiff a false statement as to said accident, or if said George White refuses to perform any of the terms or conditions of this plaintiff's policy on his part to be performed.

## XX.

That the plaintiff has no plain, speedy or adequate remedy at law in the premises.

Wherefore, plaintiff prays judgment and for an order and decree herein to the end that the plaintiff may obtain relief in the premises and declaratory judgment and relief from this Honorable Court, as follows:

1. For a declaration by this court of the respective rights and duties and liabilities of the plaintiff and defendant, Home Indemnity Company of New York, under the respective policies of insurance issued by them and which are in this complaint described.

2. That it be declared by this court that the plaintiff herein is not obligated to defend the actions brought in the Superior Court of the County of San Diego and in this complaint described, and has no liability to pay any judgment that may be rendered therein until said defendant, Home Indemnity Company of New York, has fully paid and discharged its liability under its said policy.

3. That it be decreed by this court that it is the duty of Home Indemnity Company of New York to defend said actions No. 134918 and No. 134630, and to pay any final judgments rendered therein against the defendant, George White, up to but not beyond the limits set forth in the policy of insurance issued by it. [12]

4. That it be decreed by this court that the only liability of plaintiff herein in connection with said actions No. 134918 and No. 134630, is the liability to pay that amount of any final judgments rendered therein in excess of the limits of liability of the defendant, Home Indemnity Company of New York, as provided in the policy of insurance issued by it, not exceeding, however, the limits of liability provided for in plaintiff's said policy of insurance.

5. That if this court find and so decree that the defendant, George White, has breached the conditions of the policy of insurance issued by Home Indemnity Company of New York, which is described in the complaint on file herein, and that thereby Home Indemnity Company of New York has been released from its obligations to the defendant George White thereunder, that then this court adjudge and declare that this plaintiff is not obligated to defend said action No. 134918 or said action No. 134630, but that its sole obligation under said policy is to pay such portion of any judgment or judgments which may be rendered against said George White in said actions as shall be in excess of the insurance that would have been available to said George White had he

not breached the terms and conditions of said policy of insurance issued by defendant, Home Indemnity Company of New York, as in this complaint alleged, and which excess is not in excess of the limits of liability as set forth in the policy of insurance issued by this plaintiff.

6. That a writ of subpoena issue out of this Honorable Court directed to each and all of the defendants herein, commanding them, and each of them, to appear on a day certain, to be fixed by this court, and that the defendants, and each of them, be required to answer each and every allegation of this suit in equity and to set forth in full their respective contentions in respect to the controversy herein alleged. [13]

7. That upon the failure of any of said defendants to so answer herein, default shall be entered against said defendants who shall so fail to answer, and that decree and judgment be entered in such case according to the prayer of this complaint.

8. Plaintiff prays for such other and further relief as to this Honorable Court shall seem just and equitable, and for all costs of suit herein.

NOURSE & JONES

By Paul Nourse

Attorneys for Plaintiff

Rule #4 waived. O. K. for filing.

ALBERT L. SAMES

Judge U. S. Dist. Co. [14]

### EXHIBIT A

ITEM

NAME AND ADDRESS OF INSURED

301 10 1 1 1

### DECLARATIONS

PERIOD FROM

3-1-1945

TO SEP 15 1945

LIST A V. SIGNATURE AND THE ADDRESS OF THE NAME INSURED AS AT THE BEGINNING

THIS AUTOMOBILE WILL BE FINANCIALY OWNED IN THE ABOVE TOWN, COUNTY AND STATE UNLESS OTHERWISE SPECIFIED HEREIN

THE DATE OF THE NAME INSURED IN

INSURED BY

CONTRACTED

CONTRACTED

PERIOD

IF THE INSURED HAS CANCELED ANY AUTOMOBILE INSURANCE POLICY TO THE FIRST YEAR EXCEPT AS HEREIN SET FORTH

IF THE PERIOD FOR WHICH THE AUTOMOBILE IS TO BE FINANCIAL

PERIOD AND FINANCIAL

IN THE SECTION OF THE AUTOMOBILE

YEAR & MODEL	TRADE NAME OF AUTOMOBILE	TYPE OF BODY	VEHICLE NUMBER	SERIAL NUMBER
1945	1945	2000	1945	1945
DATE OF THE NAME	DATE OF THE NAME	DATE OF THE NAME	DATE OF THE NAME	DATE OF THE NAME
MONTH	YEAR	YEAR	YEAR	YEAR
1	1	1	1	1

VI THE INSURANCE AFFORDED IS ONLY WITH RESPECT TO SUCH AND SO MANY OF THE FOLLOWING COVERAGE AS ARE INDICATED BY SPECIFIC PREMIUM CHARGE OR CHARGES THE LIMIT OF THE COMPANY'S LIABILITY AGAINST EACH SUCH COVERAGE SHALL BE AS STATED HEREIN SUBJECT TO ALL OF THE TERMS OF THE POLICY HAVING REFERENCE HERETO

COVERAGE	LIMIT OF LIABILITY	EACH PERSON	EACH ACCIDENT	POLICY NO	PREMIUM
(1) BODILY INJURY LIABILITY	5	100	100	100	100
(2) MEDICAL PAYMENTS	5	100	100	100	100

CASE AND JUDGMENT

COUNTERSIGNED AT LOS ANGELES, CALIFORNIA, BY

*James E. Jones*  
AUTHORIZING AGENT

Not valid unless countersigned by a duly authorized Agent of the Company.

Read your policy.

*Exhibit A - page 1*

# Standard

## Accident Insurance Company

DETROIT, MICHIGAN

A STOCK INSURANCE COMPANY, HEREIN CALLED THE COMPANY,

Agrees with the insured named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements of the insured, the dollar limits and subject to the limits of liability, exclusions, conditions and other terms of this policy.

## Coverage A—Bodily Injury Liability

**Example 8—Bodily Injury Liability.** To pay on behalf of the insured all sums which the insured is legally obligated to pay for damages, including damages for care and loss of services, arising out of the ownership, maintenance or use of the automobile, including death at any time resulting therefrom, sustained by any person or persons, caused by bodily injury, including death, sustained by any person or persons, caused by the insured, and because of the ownership, maintenance or use of the automobile.

## ACKNOWLEDGMENTS

## Coverge ( - Medical Payments

**Case 4—Medical Payments.** To pay to or for each person who sustains bodily injury, resulting from an airplane, ship or other conveyance, or while in or upon, entered or alighting from, (1) the automobile classified as "pleasure and business" owned or operated by the insured, (2) any other private passenger automobile with respect to the use of which insurance is provided under the named insured's policy, if the injury arises out of the operation of said automobile by the named insured or spouse, or (3) a private chauffeur or domestic servant of either or (a) the operation of said automobile by the named insured or spouse, or (b) the reasonable expense of such necessary medical, surgical, x-ray, hospital and professional attending services due to the event of the resulting from such injury, the reasonable funeral expense, authorized within one year from the date of accident.

The insurance afforded with respect to such other automobiles shall be express insurance over any other valid and collectible liability, fire, theft and comprehensive insurance, an insured within one year from the date of accident, for which the insured has made insurance available thereon.

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... . . . . . As respects such insurance as is afforded by the other terms of this policy underwriting, the company shall

[illegible]

The company agrees to pay the amounts incurred under this insuring agreement, except settlements of claims and suits, in addition to the applicable limit of liability of this policy.

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**Bond Expense** The company shall pay the cost of bonds, but with respect to the amount to apply for or furnish such bonds, guaranteeing the insured's appearance to court if such appearance is required by a court or an order of a Traffic Law violation occurring during the policy period and arising out of the use of an automobile with respect to which the insurer is afforded subroverted under coverage A of this policy. The company's liability under this insurance shall not exceed the usual charges of surety companies for such bond nor \$100.

## 1. Introduction

tion of "insured". The unqualified word "insured" wherever used in this policy, when applicable to this coverage, indicates the named insured and, except where specifically stated to the contrary, also includes any person while using the automobile and any person or organization legally responsible for the use thereof. Provided the actual use of the automobile is with the permission of the named insured. The insurance coverage is a contract of indemnification other than the named insured does not apply.

with respect to the automobile while used with any trailer not covered by like insurance in the company; or with respect to any trailer covered by this policy while used with any automobile not covered by like insurance in the company.

## A Automodule Defined

**Mobile Defined.** Trainers, Two or More Automobiles . . . Except where specifically stated to the contrary, the word "automobile" wherever used in this policy shall mean the motor vehicle, trailer or semitrailer described in this policy. The word "trainers" shall include semitrailer.

Such insurance is as afforded by this policy, for bodily injury liability with respect to a private passenger automobile applies also to a trailer not described in this policy while used with such automobile, if such trailer is designed for use with a private passenger automobile and is not a mobile and is not a home, place, office, store, product or process display, demonstration or passenger trailer. While not used with such automobile, such trailer is not insured by this policy. Such insurance applies also to such trailer but only with respect to the named insured and does not apply to the driver of the trailer or to any other person.

A. As to a two or more automobiles, the terms of this policy shall apply separately to each but a motor vehicle shall be insured in connection with an automobile as respects limits of liability, no coverage A.

### A.3. Formulation of the problem

**Terms of Use Defined**  
(a) The term "family and business" is defined as use principally in the business occupation of the declarant, including occasional use for personal, pleasure, family and other business purposes stated for the purposes stated, including the loading and unloading thereof.  
(b) The term "commercial" is defined as use principally in the business occupation of the declarant, including occasional use for personal, pleasure, family and other business purposes stated for the purposes stated, including the loading and unloading thereof.  
(c) The term "pleasure and business" is defined as use principally in the business occupation of the declarant, including occasional use for personal, pleasure, family and other business purposes stated for the purposes stated, including the loading and unloading thereof.

## A30 Use of a byline

[illegible]

How is this? A great deal of work has been done in the field of the history of the book, but the history of the book is still a very much less well-known subject.

to drive, automobile owned in full or in part by, registered in the name of, hired as part of a frequent use of hired automobiles by, or furnished for regular use to, the named insured or a member of his household other than a private chauffeur or domestic servant, or to any other person, and the vehicle is not used to transport passengers for hire.

(b) **any person** who is an insured or insured person of this production other than a private contractor or domestic servant and of the named insured or spouse, with respect to such employer, parent or guardian, to any automobile owned in full or in part by him or registered in his name or hired by him as part of a frequent use of hired automobiles.

(c) to any automobile not of the private passenger type while used in the business or occupation of the named insured or spouse, or to any private passenger automobile while used in such business or occupation if operated by a person other than the named insured or spouse, or such chauffeur or servant unless the named insured or spouse is present in such automobile; provided, however, that the named insured or spouse is not required to be present in such automobile.

to any insured other than as defined in this insuring agreement.

f. (to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place)

### VIII Temporary Use of Substitute Automobile

**Insurance Use of Substitute Automobile.** While an automobile owned in part by the insured is withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction, such insurance as is provided by the policy with respect to such automobile applies with respect to another automobile not so owned while temporarily substituted as the substitute for such automobile. This insuring agreement does not cover an insured who has insured the substitute automobile or any employee of such owner.

Exhibit A - Page 2



in the event of any payment under this policy, the insured shall be entitled to all the insured's rights of recovery therefor against any person or organization and the insured shall execute a delivery tender and assign and do whatever else is necessary to secure such rights. The insured shall do nothing to prejudice or impair such rights.

any change in the insured's ownership or liability shall be made in writing and shall be signed by the insured or its representative but in no event for a period of more than sixty days after the date of adjudication of such legal action.

Assignment of interest in this policy shall be made in writing and shall be signed by the insured or its representative but in no event for a period of more than sixty days after the date of adjudication of such legal action.

This policy may be cancelled by the named insured or its representative by mailing to the company a written notice stating when thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date of cancellation shall be the date of mailing of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

If the named insured cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected. If the company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured.

By acceptance of this policy, the named insured agrees that the statements in the declarations are his agreements and representations, and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

PANY has caused this policy to be signed by its president and secretary at Detroit, Michigan, and countersigned on the declarations page by a duly authorized agent of the company.

*Thompson*  
Secretary

*Charles J. Goutier*  
President

# MEXICAN COVERAGE ENDORSEMENT

In consideration of the premium for the policy to which this endorsement is attached and of which it forms a part, it is hereby understood and agreed that the named insured, as insured hereunder, as is afforded by the policy, is extended to apply while the automobile is being used for the purpose of the Mexican, PHON (T) and PHON (T) coverage, and that this endorsement does not apply unless the insured's place of residence is within the United States of America and the automobile insured by the policy is principally garaged, maintained and used within the United States of America.

This endorsement forms a part of the Automobile Bodily Injury Liability Policy to which it is attached.

Standard Accident Insurance Company

*Thompson*  
Secretary

(Page 4)

Standard  
Accident Insurance Company

DETROIT, MICHIGAN

A STOCK COMPANY

AUTOMOBILE  
BODILY INJURY  
LIABILITY POLICY

No. J 427867

READ YOUR POLICY

INSURANCE BUREAU

OF SOUTHERN CALIFORNIA  
INSURANCE AT ADAMS - LOS ANGELES

BALPH STENOLOS, MANAGER

TELEPHONE RICHMOND 3313

*Check a page 4*



[Title of District Court and Cause]

ANSWER OF DEFENDANT HOME INDEMNITY  
COMPANY OF NEW YORK, A CORPORATION

Comes now defendant Home Indemnity Company of New York, a corporation, and answering for itself alone and not for its co-defendants the plaintiff's complaint on file herein, admits, denies and alleges as follows:

I.

That this defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs numbered I, II, IV, VI, XIX and XX, and on that ground denies the same. [19]

II.

Admits the averments in paragraphs numbered III, V, VII, IX, X, XI, XII, XIII, XIV, XV, XVI and XVIII.

III.

Admits the averments in paragraph numbered VIII, except that said policy of insurance was issued by this defendant in the State of California instead of the State of Nevada as therein averred.

IV.

Denies generally and specifically, each and every, all and singular, the averments in Paragraph XVII, except that this defendant admits that it contends that defendant George White, in reporting the accident in said com-

4. For costs of suit herein expended and for such other and further relief as to this Honorable Court shall seem just and equitable.

THOMAS P. MENZIES and  
HAROLD L. WATT

By Harold L. Watt

Attorneys for Defendant Home Indemnity Company of  
New York, a Corporation. [22]









**AUTOMOBILE DEPARTMENT**  
37 Maiden Lane  
NEW YORK, N. Y.

**80% COLLISION COVERAGE**

In consideration of an additional premium of \$ INCLUDED the policy designated below is extended to include coverage as follows:

**80% COLLISION COVERAGE** Loss of or damage to the automobile caused by collision of the automobile with another object or by contact of the automobile but not exceeding 80% of the first \$250.00 and 100% of the amount in excess of \$250.00 of each such loss or damage.

This Endorsement is subject to the limits of liability, exclusions, conditions and other terms of such policy which are not inconsistent herewith.

This Endorsement, when countersigned by an authorized agent of the Company, and attached to Policy No. **62 CAU 6011452**

A. THE ABC Insurance Company, issued to  
LIFE ASSURANCE CO.  
COUNTY OF NEW YORK, CITY OF NEW YORK, AND  
CHESTER DE YOUNG Agent

**OMOBILE DEPARTMENT**  
37 Maiden Lane  
NEW YORK, N. Y.

**MEXICAN COVERAGE ENDORSEMENT  
for Combination Automobile Policy**

It is agreed that the coverage provided by the policy to which this endorsement is attached is extended to apply while any automobile insured hereunder is being operated in the Republic of Mexico for a period not exceeding ten (10) days at any one time subject to the following conditions:

- 1 Such insurance as is provided by this policy for bodily injury liability or property damage liability shall be excess insurance over any other valid and collectible insurance available to the insured.
- 2 As respects any loss or damage which may make necessary the repair of the insured automobile or replacement of any part or parts thereof while said automobile is in Mexican territory, under the coverages of Comprehensive Fire, Theft, Collision, and Combined Additional Coverages, the basis of adjustment of claim for such repairs or replacement shall be the cost of such repairs or replacement at the nearest point in the United States where such repairs or replacement can be made, and it is expressly understood and agreed that the cost of towing or transportation or salvage operations of the insured automobile while within Mexican territory shall not be recoverable hereunder and is not a contingency insured against.
- 3 In the event any claim for loss or damage under the coverages of Comprehensive Fire, Theft, Collision, and Combined Additional Coverages is made against this Company while the insured automobile is inside the boundaries of the Republic of Mexico, the sustenance and transportation, or the cost of same, of one adjuster, if one be sent from the nearest United States border town to the location of the damaged automobile, shall be borne by the insured whenever the accident which is the basis of the claim shall have occurred at a point in excess of twenty-five (25) miles from the United States border over a passable highway.

Attached to and forming part of Automobile Policy No. 62 CAU 6011452 issued by

THE ABC Insurance Company and The Home Indemnity Company

to MILLEN HUNTERLY et al this 2ND day of DECEMBER 1945  
Countersigned at NEW YORK, N. Y.

**CHESTER DE YOUNG**  
Authorized Agent

*Chester De Young*  
President

## AMENDMENT OF AUTOMOBILE LIABILITY POLICY

It is agreed that the policy is amended as follows:

1. The following insuring agreement is added:

**Ball Road Expense**

The company shall pay the cost of bonds, but without obligation to apply for or furnish such bonds, guaranteeing the insured's appearance in court if such appearance is required by reason of an accident or a traffic law violation occurring during the policy period and arising out of the use of an automobile with respect to which use insurance is afforded such insured under coverage A of this policy. The company's liability under this insuring agreement with respect to each bond shall not exceed the usual charges of surety companies for such bond nor \$100.

2. Insuring Agreement V Use of Other Private Passenger Automobiles is amended to read as follows:

**V Use of Other Automobiles**

Such insurance as is afforded by this policy for bodily injury liability and for property damage liability with respect to the automobile classified as "pleasure and business," applies (1) to the named insured, if an individual and the owner of such automobile, or if husband and wife either or both of whom own such automobile, and (2) to the spouse of such individual if a resident of the same household, the employer of such named insured or spouse, the parent or guardian of such named insured or spouse, if a minor, and a partnership in which such named insured or spouse is a partner, as insured, with respect to the use of any other automobile by or in behalf of such named insured or spouse.

This insuring agreement does not apply:

- (a) to any automobile owned in full or in part by, registered in the name of, hired as part of a frequent use of hired automobiles by, or furnished for regular use to, the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;
- (b) with respect to such employer, parent, guardian or partnership, to any automobile owned in full or in part by him or registered in his name or hired by him as part of a frequent use of hired automobiles;
- (c) to any automobile not of the private passenger type while used in the business or occupation of the named insured or spouse, or to any private passenger automobile while used in such business or occupation if operated by a person other than the named insured or spouse or such chauffeur or servant unless the named insured or spouse is present in such automobile;
- (d) to any insured other than as defined in this insuring agreement;
- (e) to injury to or death of any person who is a named insured;
- (f) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place.

3. Coverage C—Medical Payments is amended to read as follows:

**Coverage C—Medical Payments**

To pay to or for each person who sustains bodily injury, caused by accident, while in or upon, entering or alighting from (1) the automobile, if the injury arises out of a use thereof which is insured for bodily injury liability and is by or with the permission of the named insured, or (2) any other automobile with respect to the use of which insurance is afforded under Insuring Agreement V of this policy, if the injury arises out of the use thereof and results from (a) the operation of said automobile by the named insured or spouse or by a private chauffeur or domestic servant of either or (b) the occupancy of said automobile by the named insured or spouse, the reasonable expense of necessary medical, surgical, ambulance, hospital and professional nursing services, and, in the event of death resulting from such injury, the reasonable funeral expense, all incurred within one year from the date of accident.

The insurance afforded with respect to such other automobiles shall be excess insurance over any other valid and collectible medical payments insurance applicable thereto.

4 The word "automobile" as used in Coverage C—Medical Payments includes such trailers as are insured for bodily injury liability under the second paragraph of Insuring Agreement "Automobile Defined Trailers, Two or More Automobiles," and no other trailers.

5. In exclusion (d), the words, "or while engaged in the operation, maintenance or repair of the automobile" are deleted in connection with Coverage C—Medical Payments.

This endorsement forms a part of Policy No. CAU 6011452 issued to **WALTER BAGGETT et al**

by **THE HOME INDEMNITY COMPANY**

and is effective from **DECEMBER 2ND, 1945**  
(12:01 A M Standard Time)

Counter-signed at **NOTED FULLWOOD, G.L.**

By **CHL. TH. DE YOUNG**

(Authorized Agent)

Form H 6011-A-20M 6-45

Printed in U.S.A.

*Walter Baggett*  
President



[Title of District Court and Cause]

ANSWER OF DEFENDANT GEORGE WHITE

Comes now defendant, George White, and answering the complaint on file herein admits, denies and alleges as follows:

I.

Admits each and all of the allegations of Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX and XX of the complaint on file herein, except that this defendant is informed and believes and, upon such information and belief, alleges the fact to be that the true name of the corporation referred to in Paragraphs V, VIII, IX, XIII, XV and XVI of the complaint on file herein as "North Lumberland Mining Company" is in fact "Northumberland Mining Co."

II.

Further answering the complaint on file herein, this defendant alleges that within twenty days after the occurrence of the [31] accident described in the complaint on file herein, this defendant reported to defendant, Home Indemnity Company of New York, all of the facts within his knowledge as to the occurrence of the accident described in the complaint on file herein, and the witnesses to said accident, and that said report contained particulars sufficient to identify this answering defendant as an insured under the policy issued by said Home Indemnity Company of New York and to identify Northumberland Mining Co. as the named assured in said policy, and gave to said Home Indemnity Company of New York all of the information respecting the time, place and circumstances of said accident and the names and addresses

of the injured and of available witnesses, which were known to or were reasonably obtainable by this answering defendant, and that this defendant has at all times cooperated with the defendant, Home Indemnity Company of New York, in the defense of actions numbered 134918 and 134630 in the Superior Court of the State of California in and for the County of San Diego, which are more particularly described in the complaint on file herein, and is ready, able and willing to cooperate with said defendant, Home Indemnity Company of New York, in the defense of said actions, and will attend hearings and trials and assist in effecting settlements and securing and giving evidence, and obtaining attendance of witnesses, and in the conduct of the defense of said actions.

### III.

That this defendant has verified and delivered to defendant, Home Indemnity Company of New York, answers to the complaints filed in said actions numbered 134918 and 134630, true and correct copies of which are annexed hereto and marked respectively Exhibits A and B; that said answers were filed in said actions in behalf of this answering defendant by the attorneys employed by defendant, Home Indemnity Company of New York. [32]

### IV.

This defendant further alleges that defendant, Home Indemnity Company of New York, with full knowledge of all of the facts concerning the happening of said accident and of the errors, if any, in the report of said accident made by this answering defendant, undertook the investigation of said accident and the defense of said actions numbered 134918 and 134630 in the Superior Court of the State of California in and for the County

of San Diego, and that said defendant has thereby waived the breach, if any there was, by this defendant of the conditions of the policy of insurance issued by said Home Indemnity Company of New York.

Wherefore, this defendant prays:

1. For a declaration by this court of the respective rights of the parties;

2. That it be decreed by this court that it is the duty of the Home Indemnity Company of New York to defend on behalf of this answering defendant said actions numbered 134918 and 134630 at its own expense, and to pay any final judgments rendered therein against this defendant up to but not beyond the limits of indemnity set forth in the policy of insurance issued by it, and that the Standard Accident Insurance Company of Detroit is obligated to pay any part of said final judgments in excess of the amounts which the defendant, Home Indemnity Company of New York, is obligated to pay, not exceeding the limits of the policy issued by it;

3. That if this court should find that the defendant Home Indemnity Company of New York is not obligated to defend said actions on behalf of this defendant and is not obligated to pay any judgments rendered therein, that then this court declare that the plaintiff, Standard Accident Insurance Company of Detroit, is obligated to defend said actions and to pay any judgments rendered [33] against this defendant therein up to but not beyond the limits of indemnity set forth in its policy.

LUCE, FORWARD, LEE & KUNZEL

By Edgar A. Luce

[Verified] [34]

## "EXHIBIT A"

In the Superior Court of the State of California  
in and for the County of San Diego

No. 134918

Michael Lee, a minor, and Patricia Lee, a minor, by  
Mildred E. Taylor, their Guardian ad Litem, Plaintiffs,  
vs. George White, et al., Defendants.

## ANSWER OF DEFENDANT GEORGE WHITE

Comes now the defendant George White and answering the complaint on file herein for himself and not on behalf of his codefendant, admits, denies and alleges as follows, to-wit:

## I.

Alleges that this defendant has not information or belief sufficient to enable him to answer the allegations of paragraphs II, V and VI of the complaint on file herein and for want of such information and belief and basing his denial on that ground denies each and all of the allegations of said paragraphs, except that this defendant admits that Claude McLester Lee was at the time of his death an adult over the age of twenty-one (21) years.

## II.

Answering paragraph III of the complaint on file herein this defendant alleges that the automobile mentioned in said paragraph was at the time of said accident owned by the [35] Northlumberland Mining Company, a corporation, and at the time and place of the accident described in the complaint this defendant was driving said automobile by and with the consent of said corporation.

III.

This defendant denies generally and specifically each and all of the allegations in paragraph IV of the complaint on file herein, except this defendant admits that the automobile described in said paragraph, and while being driven by this defendant, did at or about the time and place described in said paragraph collide with Claude McLester Lee and that as a result of said collision said Claude McLester Lee sustained injuries which directly and proximately resulted in his death.

IV.

This defendant denies that the plaintiffs, or either of them, have been damaged in any sum whatsoever.

And for a Further, Separate and Second Defense, This Defendant Alleges:

I.

That if the plaintiffs sustained damages in the particulars in their complaint set out, or otherwise, that the same occurred proximately and directly through and by reason of the negligence of the decedent in failing to exercise due or any care or caution for his own safety.

Wherefore, this defendant prays that the plaintiffs take nothing by their said action and that this defendant have and recover his costs of suit herein expended.

THOMAS P. MENZIES and  
HAROLD L. WATT

By Thomas P. Menzies

Attorneys for Defendant George White [36]

State of California,  
County of San Diego.—ss

George White, being first duly sworn, deposes and says:

That he is one of the defendants in the above entitled action; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

GEORGE WHITE

Subscribed and sworn to before me this 23rd day of August, 1946.

GAYLE H. DAVIS

Notary Public in and for Said County and State [37]

“EXHIBIT B”

In the Superior Court of the State of California  
in and for the County of San Diego

No. 134630

James Carl Fitzgerald, a minor, by and through his Guardian ad Litem, James Richard Osborne, and James Richard Osborne, Plaintiffs, vs. George White, and North Lumberland Mining Company, Defendants.

ANSWER OF DEFENDANT GEORGE WHITE

Comes now the defendant, George White, and answering the complaint on file herein for himself and not on

behalf of his codefendant, admits, denies and alleges as follows, to-wit:

I.

Alleges that this defendant has not information or belief sufficient to enable him to answer the allegations of paragraphs I, IV and V of the first alleged cause of action and paragraph II of the second alleged cause of action of the complaint on file herein, and for want of such information and belief and basing his denial on that ground denies each and all of the allegations of said paragraphs and the whole thereof.

II.

Denies that the plaintiff, James Carl Fitzgerald has been damaged in the sum of Fifty Thousand Dollars (\$50,000.00), or in [38] any sum, or at all; denies that the plaintiff James Richard Osborne has been damaged in the sum of Five Hundred Dollars (\$500.00), or in any other sum, or at all.

III.

Answering paragraph II of the first alleged cause of action set forth in the complaint on file herein, this defendant denies generally and specifically each and all of the allegations of said paragraph, except this defendant admits that the Lincoln Zephyr automobile described in said paragraph was at the time of the accident described in the complaint, owned by the defendant, North Lumberland Mining Company, and this defendant was at the time and place of the accident driving said automobile with the full knowledge and consent of said North Lumberland Mining Company.

## IV.

Answering paragraph III of the first alleged cause of action of the complaint on file herein this defendant denies generally and specifically each and all of the allegations of said paragraph, except that this defendant admits that the automobile driven by him did at or about the time and place described in the complaint, collide with Leana Mae Osborne Lee and that as a result of said collision Leana Mae Osborne Lee died, and except that this defendant has not information and belief sufficient to enable him to answer the allegations of said paragraph that said Leana Mae Osborne Lee was the mother of the plaintiff, James Carl Fitzgerald, and for want of such information and belief and basing his denial on that ground denies that Leana Mae Osborne Lee was the mother of the plaintiff, James Carl Fitzgerald.

And for a Further and Separate Defense to Each of the First and Second Causes of Action Set Forth in the Complaint on File Herein This Defendant Alleges: [39]

## I.

That if the plaintiffs sustained damages in the particulars in their complaint set out, or otherwise, that the same occurred proximately and directly through and by reason of the negligence of the decedent in failing to exercise due or any care or caution for her own safety.

Wherefore, defendant prays that the plaintiffs take nothing by their said action and that this defendant have and recover his costs of suit herein expended.

THOMAS P. MENZIES and  
HAROLD L. WATT

By Thomas P. Menzies

Attorney for Defendant George White



State of California,  
County of San Diego.—ss

George White, being first duly sworn, deposes and says:

That he is one of the defendants in the above entitled action; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

GEORGE WHITE

Subscribed and sworn to before me this 23rd day of August, 1946.

GAYLE H. DAVIS

Notary Public in and for Said County and State [40]

[Affidavit of Service by Mail]

[Endorsed]: Filed October 9, 1946. [41]

[Title of District Court and Cause]

## ANSWER

James Carl Fitzgerald, a minor, by and through his guardian ad litem, James Richard Osborne, and James Richard Osborne, severing themselves from the other defendants herein, for themselves only, deny certain of the allegations of plaintiff's complaint as follows:

### I.

These answering defendants have not sufficient information or belief to enable them to otherwise answer to the allegations of paragraphs XVI and XVII of plaintiff's complaint, and basing their denial upon said ground, deny generally and specifically [42] each and every allegation of said paragraphs of plaintiff's complaint.

Wherefore, these answering defendants pray that plaintiff be put upon strict proof of the allegations hereinabove denied, and *they* they have such other and further relief as to the court seems just in the premises.

EDGAR B. HERVEY

Attorney for Defendants

[Verified]

Received copy of within Answer this 17 day of October, 1946. Nourse & Jones, Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 17, 1946. [43]

[Title of District Court and Cause]

ANSWER OF DEFENDANTS,  
MICHAEL LEE AND PATRICIA LEE

Come now Michael Lee and Patricia Lee, minors, each by Mildred E. Taylor, their guardian ad litem herein, and, answering the complaint herein, admit, deny and allege as follows:

I.

Allege that Michael Lee is a minor of the age of nine years and that Patricia Lee is a minor of the age of eleven years; that by an order of the above-entitled court duly made herein on September 10, 1946, Mildred E. Taylor was duly appointed guardian ad litem of the said minors in this cause; that said order has not been revoked and is in full force and effect and that by virtue thereof Mildred E. Taylor is now the duly appointed, qualified and acting guardian ad litem of said minors. [44]

II.

Admit the allegations contained in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XIII, XIV, XV, XVI, XVIII and XX.

III.

Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs XVII and XIX, and, basing their denial upon that ground, deny generally and specifically each and every allegation thereof.

IV.

Answering paragraph XII, deny that by the terms of the policy mentioned in said paragraph XII, it was fur-

ther provided that such insurance as to the use of said substituted automobile should be excess insurance over any other valid and collectible insurance available to George White under a policy applicable with respect to the substituted automobile, or otherwise, against loss covered by either or both of said insuring agreements;

Further answering paragraph XII, allege that defendant, Home Indemnity Company of New York, a corporation, asserts to and has informed these answering defendants that the insurance otherwise afforded George White as the driver of the Lincoln automobile mentioned in the complaint is not and cannot be made collectible or available to George White against loss arising out of the accident mentioned in the complaint;

Further answering paragraph XII of the complaint, these defendants are informed and believe, and, upon such information and belief, allege the fact to be that defendant, Home Indemnity Company of New York, at all times since the accident mentioned in the complaint, has had full and adequate notice of the occurrence of the accident, has fully and thoroughly investigated the accident and has had and received the best possible assistance and cooperation of and from George White and the owner of said Lincoln automo- [45] bile, and in no way had or has been prejudiced by failure by George White or the owner of said Lincoln automobile to comply at an earlier time or in a different or more formal manner with the conditions and terms of the last-mentioned policy;

Deny each and every other allegation contained in paragraph XII.

For a Second, Separate and Distinct Defense to the Cause of Action Set Forth in Said Complaint, These Answering Defendants Allege:

I.

That these answering defendants are informed and believe, and, upon such information and belief, allege that immediately following the accident described in the complaint on file herein George White reported to Home Indemnity Company of New York all the facts within his knowledge as to the accident described in said complaint, giving the names of the witnesses known to him and such other particulars and facts as would and did enable and permit said Home Indemnity Company of New York to identify the said George White, the policy of insurance mentioned in the complaint as issued by Home Indemnity Company of New York, Northumberland Mining Company as the assured named in the policy, and such other information as was known to him respecting the time, place and circumstances of the accident, the names and addresses of the injured or dead; and that the said George White has at all times cooperated with Home Indemnity Company of New York in the investigation of the accident and in the defense of the actions filed in the Superior Court of San Diego County, described in the complaint herein;

That these answering defendants are informed and believe, and, upon such information and belief, allege that the defendant, George White, is now, and at all times

since said accident has [46] been, and will at all times hereafter be, ready, willing and able to cooperate with Home Indemnity Company of New York in the defense of said actions;

That these answering defendants are informed and believe, and, upon such information and belief, allege that Home Indemnity Company of New York has known about the accident mentioned in the complaint at all times from and after approximately twenty-four hours after the occurrence thereof, has fully and thoroughly investigated the accident, and within three days after the accident knew the names and addresses of all available witnesses, and had an opportunity at a public hearing authorized by law, to wit, a coroner's inquest in the County of San Diego, State of California, to examine all witnesses under oath and to require defendant, George White, to be sworn as a witness and examined into the facts of the accident; that Home Indemnity Company of New York was represented at such inquest by its duly authorized attorney at law; that Home Indemnity Company of New York; through its duly authorized attorneys, has prepared pleadings, and has signed and filed pleadings in the civil actions in the Superior Court of San Diego County, mentioned in the complaint; that the said Home Indemnity Company of New York, through its duly authorized attorneys at law, within seven days after said accident, did attempt to negotiate a settlement with these answering defendants, such settlement being settlements of the liability of George White and North-

umberland Mining Company, and each thereof, for the death of Claude McLester Lee, and the cause of action then held by these answering defendants under the laws of the State of California, arising out of such death, and the relationship of these answering defendants to Claude McLester Lee, and the damages suffered by them as a result of such death.

## II.

That the defendant, Home Indemnity Company of New York, [47] with full knowledge of all the true facts concerning the said accident, did enter into such negotiations for settlement, did enter into and accept the defense of said actions, and each thereof, and did, in all ways, accept and undertake to perform the obligations, duties and liabilities on its part to be performed under its said policy of insurance, mentioned in the complaint; and that the said Home Indemnity Company of New York has waived the breach, if any there was, by defendant, George White, of the conditions of the said policy of insurance issued by Home Indemnity Company of New York.

Wherefore, these answering defendants pray:

(1) For a declaration of the respective rights of the parties;

(2) That it be decreed by the Court that it is the duty of Home Indemnity Company of New York to comply with the agreements on its part to be performed under the terms and provisions of its said policy of insurance;

(3) That in the event the Court finds that Home Indemnity Company of New York is not obligated to defend said actions or to otherwise comply with the agreements on its part to be performed under the said policy, that then this Court declare that Standard Accident Insurance Company of Detroit is fully obligated under the agreements of its policy of insurance, mentioned in the complaint, to pay, on behalf of George White and Northumberland Mining Company, and each thereof, all sums which they, or either of them, shall become obligated to pay by reason of the liability imposed upon them, or either of them, by law for damages for the death of Claude McLester Lee, caused in and by reason of the accident mentioned in the complaint; and

(4) For such other and further relief as to the Court may seem proper in the premises.

WILLIAM GUTHRIE

JOHN B. LONERGAN and

DONALD W. JORDAN

Attorneys for Defendants, Michael Lee and  
Patricia Lee

By John B. Lonergan [48]

[Verified]

[Affidavit of Service by Mail on Nourse & Jones]

[Endorsed]: Filed Oct. 28, 1946. [49]



[Title of District Court and Cause]

INTERROGATORIES PROPOUNDED BY PLAINTIFF TO DEFENDANT, HOME INDEMNITY COMPANY OF NEW YORK

Under and in accordance with Rule 33 of the Federal Rules of Civil Procedure, plaintiff hereby propounds and requires that defendant, Home Indemnity Company of New York, answer the following interrogatories:

1. Did the Northumberland Mining Co. report to you the accident which is described in paragraph XIII of the complaint herein, which accident occurred on or about the 20th day of July, 1946, at or near Solano Beach, California. [Written in margin]: Allowed.

2. If your answer to Interrogatory No. 1 is that a report was made to you by Northumberland Mining Co., state whether or not said report was in writing. [Written in margin]: Allowed. [50]

3. If your answer to Interrogatory No. 2 is that this report was in writing, attach a full, true and complete copy of said report. [Written in margin]: Allowed.

4. If your answer to Interrogatory No. 2 is that the report of Northumberland Mining Co. was oral, state the substance of said report. [Written in margin]: Allowed.

5. Did the defendant, George White, report to you the accident described in paragraph XIII of the complaint on file herein [Written in margin]: Allowed.

6. If your answer to Interrogatory No. 5 is in the affirmative, state whether or not said report was in writing. [Written in margin]: Allowed.

7. If your answer to Interrogatory No. 6 is that said report was in writing, attach a full, true and correct copy of said report. [Written in margin]: Allowed.

8. If your answer to Interrogatory No. 6 is that said report was not in writing, state whether or not the report was made before and recorded by a shorthand reporter. [Written in margin]: Allowed.

9. If your answer to Interrogatory No. 8 is that said oral report was recorded by a shorthand reporter, state the name of the reporter and whether or not you have a transcript of such report. [Written in margin]: Allowed.

10. If your answer is that you have a transcript of said report, attach a full, true and complete copy of such transcript. [Written in margin]: Allowed.

11. If your answer to Interrogatory No. 6 is that George White's report was oral, state the names and addresses of the persons present at the time said report was made. [Written in margin]: Allowed. [51]

12. If your answer to Interrogatory No. 8 is that said report was not recorded in shorthand, state the substance of his oral report. [Written in margin]: Allowed.

13. If your answer to Interrogatory No. 5 is that George White did report to you said accident, state whether or not, after the date of his original report, he made any further report to you of any facts concerning said accident or his knowledge thereof. [Written in margin]: Allowed.

14. If your answer to Interrogatory No. 13 is that he did make a further report, attach a copy thereof hereto if said additional report was in writing, or if it was

oral state the substance of said additional report, and give the date of making of said additional report, and the names and addresses of the persons present. [Written in margin]: Allowed.

15. Did John T. Holt, attorney at law for George White, state to you in behalf of George White any facts concerning the accident described in paragraph XIII of the complaint on file herein, in addition to those set forth in the written statement of George White? [Written in margin]: Not allowed.

16. If your answer to Interrogatory No. 15 is in the affirmative, state the substance of the statements made to you by John T. Holt, and state the name and address of the person to whom said statements were made. [Written in margin]: Not allowed.

17. In paragraph I of the Separate and Special Defense set forth in your answer to the complaint on file herein, you allege that the defendant, George White, intentionally gave to you false, misleading and conflicting statements. State in detail what statements were made to you by George White you claim to be false, misleading or [52] conflicting. [Written in margin]: Allowed.

18. State the names and addresses of the persons to whom each of said false, misleading or conflicting statements was made. [Written in margin]: Not allowed.

19. As to each statement made by George White which you assert was false or misleading, state the names of the witnesses by whom you intend to prove that said statements were false or misleading, and state the facts which you expect to prove by said witnesses. [Written in margin]: Not allowed.

20. State the date upon which you discovered or were advised as to the facts which you contend show that the statements of George White were false or misleading. [Written in margin]: Allowed.

21. Did you, through your agents, attorneys or representatives, investigate the accident referred to in Interrogatory No. 1? [Written in margin]: Allowed.

22. If your answer to Interrogatory No. 21 is in the affirmative, state the name and address of the person or persons conducting said investigation. [Written in margin]: Not allowed.

23. If your answer to Interrogatory No. 21 is in the affirmative, state whether or not said persons made a written report or reports to you of said investigation. [Written in margin]: Allowed.

24. If your answer to Interrogatory No. 23 is that a written report or reports were made, state the name and address of the person who now has custody of such reports. [Written in margin]: Allowed. [53]

25. State the name and address of the person now having custody of the reports of said accident or of any transcript of reports of said accident, which reports were made by Northumberland Mining Co. or George White. [Written in margin]: Allowed.

26. Did you file, or cause to be filed, on behalf of defendant, George White, answers on his behalf in those certain actions pending in the Superior Court of the State of California in and for the County of San Diego, entitled respectively, "Michael Lee, a minor, and Patricia Lee, a minor, by Mildred E. Taylor, their guardian ad litem, Plaintiffs v. George White, et al., Defendants," numbered 134918 in the files of said court, and "James

Carl Fitzgerald, a minor, by and through his guardian ad litem, James Richard Osborne, and James Richard Osborne, Plaintiffs vs. George White and North Lumberland Mining Company, Defendants," numbered 134630 in the files of said court, which said actions are described in paragraph XIV and XV of the complaint on file herein? [Written in margin]: Allowed.

27. If your answer to Interrogatory No. 26 is in the affirmative, state whether or not you filed, or caused the said answers to be filed, after you had discovered that defendant, George White, had made to you false, misleading or conflicting statements as to the facts of said cases. [Written in margin]: Allowed.

28. In your answer you admit that you have denied all liability and obligation to defendant, George White, under the policy of insurance which is annexed to your answer. State whether or not, prior to the commencement of this action, you advised the defendant, George White, of your denial of liability to him. [Written in margin]: Not allowed. [54]

29. If your answer to Interrogatory No. 28 is in the affirmative, attach a copy of any letter written by you, or in your behalf, to said George White advising him that you did deny liability. [Written in margin]: Not allowed.

NOURSE & JONES

By Paul Nourse

Attorneys for Plaintiff [55]

[Affidavit of Service by Mail]

[Endorsed]: Filed Oct. 25, 1946. [56]

[Title of District Court and Cause]

ANSWERS OF DEFENDANT HOME INDEMNITY  
COMPANY OF NEW YORK, A CORPORATION,  
TO INTERROGATORIES PROPOUNDED BY  
PLAINTIFF.

Under and in accordance with Rule 33 of the Federal Rules of Civil Procedure, defendant Home Indemnity Company of New York, a corporation, hereby answers the interrogatories propounded by plaintiff.

1. In answer to the first interrogatory it saith: A broker through whom the insurance was placed telephoned that the newspapers reported that George White was involved in an automobile accident, but that this defendant was not involved because White carried his own insurance.

2 In answer to the second interrogatory it saith: Said report was not in writing. [57]

3. In answer to the third interrogatory it saith: Said report was not in writing.

4. In answer to the fourth interrogatory it saith: Mr. Walter Haggerty, President of the Northumberland Mining Company, on July 22, 1946, made an oral statement which was transcribed by a court reporter, a copy of which is hereto attached.

5. In answer to the fifth interrogatory it saith: Yes.

6. In answer to the sixth interrogatory it saith: Said report was not in writing.

7. In answer to the seventh interrogatory it saith: Said report was not in writing.

8. In answer to the eighth interrogatory it saith: Yes.

9. In answer to the ninth interrogatory it saith: R. B. Whitcomb, Official Shorthand Reporter, San Diego, California, and this defendant has a transcript of such report.

10. In answer to the tenth interrogatory it saith: A full, true and complete copy of such transcript is hereto attached.

Case No. 5729 O'C, Civ. Std. Accid. vs. Home Ind. Plf. Exhibit Date 1/20/47. No. 6 in Evidence. Ans. 5, 8, 9, 10. Clerk, U. S. District Court. Sou. Dist. of Calif. Cross, Deputy Clerk.

11. To the eleventh interrogatory it saith: Thomas P. Menzies, 548 South Spring Street, Los Angeles, L. E. Clifton, 639 South Spring Street, Los Angeles, [58] and R. B. Whitcomb, Court House, San Diego.

12. To the twelfth interrogatory it saith: Said report was recorded in shorthand.

13. In answer to the thirteenth interrogatory it saith: He did not report any additional facts or his knowledge of the accident other than that he said "he must have gone to sleep" and that "he might have hit the victims while asleep without knowing it."

14. In answer to the fourteenth interrogatory it saith: See answer to Interrogatory No. 13.

Case No. 5729 O'C. Std. vs. Accident. Plf. Exhibit. Date 1/20/47. No. 7 in Evidence. Ans. 13 & 14. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

17. In answer to the seventeenth interrogatory it saith:

- (1) That the damage to the left front fender of the car of the Northumberland Mining Co., which he was driving, occurred at the Hollywood Park Race Track and not at the scene of the accident.
- (2) That when he came out of the Race Track the left headlight was broken, smashed in; that the damage was done while the car was parked at said Race Track, and that someone must have taken the car without his knowledge or consent.
- (3) That between the time he left a drive-in stand in the City of San Clemente and the time that he arrived in the City of San Diego, he did not hit any pedestrian or other object on the road.
- (4) That between the time he left San Clemente and the time that he left the Del Mar Hotel in Del Mar, California, he was not involved in any traffic accident. [59]
- (5) That he did not remember passing through Solano Beach and that he did not collide with any object.
- (6) That the automobile operated by him did not collide with any object or individual person.
- (7) That he did not know that he had hit anyone.
- (8) That "if anybody got killed, it was an accident I knew nothing about."
- (9) "I have told you about all I know about it."



20. In answer to the twentieth interrogatory it saith: On, to-wit, August 19, 1946.

21. In answer to the twenty-first interrogatory it saith: Yes; under a reservation of rights.

23. In answer to the twenty-third interrogatory it saith: Yes.

24. In answer to the twenty-fourth interrogatory it saith: L. E. Clifton, Claims Manager, The Home Indemnity Company, 639 South Spring Street, Los Angeles, California.

25. In answer to the twenty-fifth interrogatory it saith: Some of the records and reports are in the custody of E. M. Jewell, Claims Manager for The Home Indemnity Company, 59 Maiden Lane, New York, and some of the records are in the possession of Thomas P. Menzies, 548 South Spring Street, Los Angeles, California, attorney of record for said defendant in this action.

26. In answer to the twenty-sixth interrogatory it saith: Yes. [60]

27. In answer to the twenty-seventh interrogatory it saith: Yes; with reservation of rights.

THE HOME INDEMNITY COMPANY OF  
NEW YORK, a Corporation,

By L. E. Clifton

Claims Manager [61]

IN RE: NORTHUMBERLAND MINING  
COMPANY—GEORGE WHITE

Statement of Walter Haggerty July 22, 1946, at 3:00 P. M., Room 349 Beverly Hills Hotel, Beverly Hills, Calif.

Present: Thomas P. Menzies.

Q. (By Mr. Menzies) Mr. Haggerty, this car Mr. White was driving a Lincoln Zephyr? A. Yes.

Q. You bought the car around in 1942, didn't you?

A. Yes. One of our stockholders owned the car and we sold the car we were using for that purpose and bought this one at a very good price, since we had to have it in our business.

Q. I take it that this company is incorporated in Nevada? Is that right? A. Yes.

Q. What is the name of it?

A. Northumberland Mining Company.

Q. When did you incorporate?

A. We were incorporated about 1939.

Q. About 1939?

A. Yes. I can get you the exact date, if you want it.

Q. That is close enough. It was incorporated in the State of Nevada? A. Yes.

Q. And since that time it has been a duly organized and operating company in that state? [62]

A. Yes.

Q. Are you an officer of the company?

A. I am the president of the company.

Q. And this Lincoln Zephyr belonged to the company?

A. It belonged to the company.

Q. It was stored here regularly?

A. I have had it here since we had the order closing gold activities.

Q. You have kept it here at the Beverly Hills Hotel?

A. Yes. It has been here most of the time except when I had some business around.

Q. Was that car involved, so far as you know, in an accident recently? I am speaking now of Mr. White's difficulties.

A. Not that I know of. I would have no knowledge of it.

Q. You have no personal knowledge of it?

A. No.

Q. You have been ill, I understand, for a week or so?

A. A week ago Monday.

Q. How did George White come in possession of the car?

A. He has a Packard and he is having some piston and cylinder work done on it, and he asked me if I had any objection—I have driven with him in his car many times—to him borrowing the car from me to carry on some things he had to do.

Q. When did you give him permission to use it? [63]

A. He used it for about three afternoons, say from Wednesday or Thursday on. He used it just in the afternoons, and then he had this business down the road and then he asked me if he could use it.

Q. Business at San Diego, or some place?

A. At San Diego.

Q. And you gave him permission to use the car?

A. Yes.

Q. When was it he asked you to use the car to go to San Diego? When he took the car?

A. It was about Friday or Saturday afternoon he asked me if he could use the car.

Q. After you gave him permission to take the car to San Diego, you don't know what happened except what he has told you? A. That is right.

Q. Have you talked to him?

A. I talked to him just now.

Q. Did he tell you how the accident happened? A. No. I read the paper and he said "Absolutely not so." He said, "There is some big mistake, and I can not understand it." That was his statement, which he will probably tell you. When I read the paper and then listened to him, it didn't seem to make sense.

Mr. Menzies: That is all. [64]

SWORN STATEMENT OF GEORGE WHITE  
MADE ON THE 23d DAY OF JULY, 1946,  
AT SAN DIEGO, CALIFORNIA

Present: Mr. Thomas P. Menzies, Attorney at Law; Mr. Clifton; R. B. Whitcomb, Notary Public and Shorthand Reporter.

Questions by Mr. Menzies:

Q. State your full name.

A. George White.

Q. How old are you, Mr. White?

A. Fifty-three.

Q. Where do you live?

A. At the Beverly Wilshire Hotel, Beverly Hills.

Q. What is your business or occupation?

A. Theatrical producer.

Q. Are you employed at the present time?

A. I employ myself.

Q. Have you an office, Mr. White?

A. No, I use the hotel as my office.

Q. You are a permanent resident of the State of California?

A. Yes.

Q. You have been for several years? [65]

A. Yes.

Q. Now do you know of a Mr. Walter Haggerty?

A. Yes.

Q. He also resides at the Beverly Wilshire Hotel, Beverly Hills, California?

A. Yes.

Q. Did you at any time within the last week borrow a 1942 Lincoln Zephyr that was sort of a silver gray color from him?

A. Yes.

Q. And that bore a Nevada license plate, 1946 license 33-674?

A. Yes, I think so.

Q. What day did you borrow that car from Mr. Haggerty?

A. I picked it up sometime after noon time Saturday.

Q. On Saturday the 19th of July? This is the 23d.

A. It was last Saturday. The date I don't know.

Q. You own a car yourself?

A. Yes.

Q. What kind of a car?

A. A Packard Coupe 1942.

Q. Was your car at that time in the garage being worked on?

A. It was in the Earl C. Anthony place in Beverly Hills having new rings and pistons put on.

Q. How long had the car been in there? [66]

A. It is still there.

Q. You picked up Mr. Haggerty's car around noon on the 19th of July, and that was in the Beverly Wilshire Garage, was it? A. That is right.

Q. Where did you go then?

A. To the Inglewood Race Track.

Q. Was that Friday or Saturday?

A. Saturday.

Q. That was the 20th rather than the 19th. You went directly from the Beverly Wilshire Hotel to the Inglewood Race Track at Inglewood, California?

A. Yes, that is right.

Q. What time did you get to the race track?

A. Oh, I couldn't tell exactly what time. It might have been probably around between twelve-thirty and twelve forty-five, around that time. I would say between half past twelve and twelve forty-five.

Q. Did you park the car there? A. Yes.

Q. Do you remember what area you parked it in?

A. Right around behind the club house, the Turf Club area. The club house, Turf Club area; I think that is what you call it.

Q. Did you get a parking ticket for it?

A. No. [67]

Q. Did you lock the car? A. No.

Q. After you parked the car where did you go?

A. I went to the race track.

Q. Into the Turf Club?

A. No, I went into the, what they call the grand-stand.

Q. Then how long did you remain there at the Inglewood Park Race Track?

A. Until the last race was over.

Q. Do you remember what time of day that was?

A. It is usually around six o'clock or a little after, I imagine.

Q. Did you see anybody you knew there at the race track?

A. Yes, lots of people.

Q. Can you remember any of their names?

A. Well; too many names to mention.

Q. What time did you go out to your car after the last race?

A. After the last race was over. Everybody makes sort of a rush.

Q. Do you remember what time that was?

A. Probably after the last race, five or ten after six, I don't know.

Q. When you went out to where you parked your car did you find it there? [68]

A. I found it about, I would say twenty or thirty yards down the line from where I had left it.

Q. How do you fix the point where you left your car?

A. Well, there is a line, white chalk lines. I left it about in the middle of—I left it about in the middle and it was down near the end of it.

Q. Do they have those parking areas marked with letters or figures? Are they numbered?

A. I never noticed that matter.

Q. Now at the time you got this Lincoln Zephyr from Mr. Haggerty was there any damage to the front end of the car?

A. When I got it from—

Q. Yes.

A. I didn't notice.

Q. When you parked it there around one o'clock at the race track was there any damage to the front end of the car?

A. I didn't notice if there was.

Q. You weren't involved in any traffic accident between the time you left the Beverly Wilshire Hotel and the time you arrived at the race track? A. No.

Q. After you came out of the race track after the last race did you examine the car?

A. When I came out the left headlight was broken, smashed in. I just looked around. I didn't see anything or anybody there, everybody was rushing off for their cars. [69] There was nobody there to complain to and it would just be a waste of time because it is a pretty big place. I said, "Oh, the hell with it, what will I do, or what will I tell the guy."

Q. What was the condition of the left fender?

A. I didn't notice the fender. I just saw it and jumped in the car to get out of the track as soon as I could.

Q. Do you remember what damage was done to the left headlights? Was it merely the glass was broken or was the whole headlight destroyed?

A. Bashed in, and there was some of the glass around there.

Q. Laying in the parking area?

A. In the headlight.

Q. In the headlights?

A. Yes, in the headlight.



Q. Was it merely that the headlight was broken or was it depressed into the fender?

A. It was depressed in. It looked to be. I didn't stop to make an examination of it. I said, "What is the use?"

Q. Were there any marks on that fender when you saw it such as stains, brown stains or anything like that?

A. I didn't look to see.

Q. Then after you looked—

A. As a matter of fact as I came toward the car I saw the car parked this way and I thought—let's skip what [70] I thought to myself—as I neared the car I come to the right side of the car. I saw the thing and I said, "Well, what is the use of who the hell did it; there are a million cars and people rushing in and out; there is nobody to complain to, no cops," so I got in the car, in the right side instead of walking around, you know.

Q. Was there any parking lot attendant there when you first parked the car that afternoon?

A. I didn't see any.

Q. Was there any there when you came out?

A. I didn't see any.

Q. After you got in the car after you looked at the fender, the left front fender, where did you go then?

A. I drove the car to the hotel.

Q. Which hotel?

A. The Beverly Wilshire Hotel.

Q. In other words, you drove from the Inglewood Race Track back to the Beverly Wilshire Hotel?

A. Yes.

Q. Do you remember what time you got back to the Beverly Wilshire Hotel?

A. It is about a half hour, twenty-five minutes to a half hour.

Q. You got there about—

A. I got to the hotel about twenty-five past six.

Q. How long did you remain there at the hotel? [71]

A. Just a few minutes, long enough to pick up my bag.

Q. You went up to your room to get it and turned around and came back down? A. I went up to my room to get it and came back.

Q. Then where did you go?

A. I left for San Diego.

Q. Which road did you take going to San Diego?

A. The 101 Highway.

Q. Where did you get on to 101?

A. I go along the street from the hotel to Olympic, then I go up Olympic to a street called Overland, and then I cut across Overland to another street the name of which I don't know, then I go right a few blocks and get on Sepulvedo—I don't know the names of all the streets—then Sepulvedo goes right into 101.

Q. You followed Sepulvedo on to 101? A. Yes.

Q. Did you stop any place?

A. I stopped at a drive-in.

Q. Where? A. In San Clemente.

Q. Between the time you left the Beverly Hills Hotel you did not get out of the car and go in any place until you went in to a drive-in stand in San Clemente?

A. No.

Q. Do you know which side of San Clemente that drive- [72] in stand was located?

A. Yes, it is just as you come into San Clemente from Beverly Hills.

Q. What time was it when you got to that drive-in stand?

A. I would say about—I go down there every Saturday night; it is about seventy miles. I usually travel around forty miles an hour, thirty-five or forty. I would say sometime around nine o'clock or eight forty-five. Sometime around nine o'clock, eight forty-five or nine o'clock.

Q. You had left the hotel about six forty-five or thereabouts?

A. Between six thirty-five and forty-five.

Q. Six thirty-five and six forty-five. I assume you went into the hotel and got your bag. A. Yes.

Q. You drove straight down there without getting out of the car. Were you involved in any traffic accident between the time you left the Beverly Wilshire about six thirty or six forty-five until you stopped at the drive-in stand somewhere between eight forty-five and nine o'clock in San Clemente? A. No.

Q. How long did you remain there at the drive-in stand?

A. Oh, I imagine about ten minutes, ten or fifteen minutes. [73]

Q. Did you have something to eat there?

A. I had a couple of cups of coffee.

Q. Was that all?

A. A couple of cups of coffee and a sandwich.

Q. Do you remember who served you there at the drive-in stand?

A. It was a girl. I didn't pay any attention to her.

Q. Was it the one who usually waited on you when you stopped there on Saturday night?

A. I wouldn't know if she was there because I don't usually stop there.

Q. I misunderstood you. I thought you said you stopped in there before coming down.

A. I had stopped there before but not as a usual thing, once in awhile. In all the months of going through I may have stopped at this place two or three times.

Q. What time did you leave the drive-in stand?

A. I should say sometime approximately between nine and nine-fifteen or nine-twenty.

Q. Did anything occur there at the drive-in stand that might in any way help this girl to identify you that waited on you?

A. The only thing that she might remember is the fact that I took the coffee outside and sat in the car and listened to the car radio. I went back with the cup and got another cup of coffee and came back again to the car. When [74] I brought it back she was standing right by the door as you go in and I put the cup and saucer up on a higher ledge that almost reached to her chin and I left what change there was.

Q. When you went back to the Beverly Hills Hotel after—

A. Beverly Wilshire.

Q. Beverly Wilshire, thank you—after the grip, did you talk to Mr. Haggerty?

A. I just stopped by his door and said, "How do you feel?" He had a cold. "How do you feel" and I rushed off.

Q. Mr. Haggerty gave you permission to drive the car down to San Diego? A. Yes.

Q. You told him you were going there?

A. Yes, he knew that.

Q. Now after you left the drive-in stand in San Clemente around nine-fifteen where did you go?

A. Straight on to San Diego.

Q. Between the time you left the drive-in stand and the time you got to San Diego were you involved in any traffic accident? A. No sir.

Q. Did you hit any pedestrian or any other object on the road? A. No, not that I know of.

Q. Did you collide with any automobile?

A. No. [75]

Q. Or truck or any other object? A. No.

Q. Do you remember what time it was when you got to San Diego?

A. I forgot to tell you I stopped at the Del Mar Hotel. I was a little sleepy and I stopped at the Del Mar Hotel.

Q. Do you remember what time it was when you got to the Del Mar Hotel?

A. That must have been around . . . I couldn't tell the exact time, but it must have been around ten o'clock, maybe a little after. I wouldn't know exactly. I had no particular reason—

Q. Did you see anybody in the Del Mar Hotel you knew in Del Mar, California?

A. No. I was looking for the . . . the place was pretty well crowded Saturday evening. I was looking for a fellow I knew that is supposed to have an interest in the hotel to ask him about a reservation when the Del Mar Track opened, and I walked through the lobby

and all around the place. Just took a chance that I might catch him here.

Q. Between the time you left San Clemente and the time you stopped at the Del Mar Hotel in Del Mar, California, were you involved in any traffic accident?

A. No.

Q. You didn't get out of the car? [76]

A. No.

Q. No obstructions struck the car?

A. Not that I know of.

Q. You didn't collide with any other object?

A. Not that I know of.

Q. Now when you left the Del Mar Hotel somewhere around ten or ten-fifteen, was that it?

A. Around that time.

Q. In the evening, you drove directly to San Diego?

A. That is right.

Q. Between the time you left the Del Mar Hotel and the time you got to San Diego were you involved in any traffic accident?

A. No.

Q. Did the automobile collide with any object or individual person or truck?

A. No.

Q. You didn't stop and get out of the car at any time?

A. No.

Q. Do you remember passing through Solano Beach?

A. Not particularly.

Q. At any time did you adjust the headlights of the car by dimming them, cutting them off or cutting the tail light off?

A. No.

Q. Was there any switch in the car by which you can [77] cut the tail lights off and leave the headlights on?

A. I don't think so. I don't know of any car that has that. I don't know, I am sure it isn't on this car.

Q. Now what time did you get to San Diego?

A. I think it was around a little before eleven or around eleven. I happened, if I remember right the clock in the police station I think was eleven o'clock when I looked at it or a little after.

Q. What happened as you drove into San Diego?

A. When I got into town a motorcycle policeman came alongside, pulled up. I saw him through the mirror coming along so I stopped. I said, "What is the matter? I am not speeding." I was going pretty slow. He said, "I am sorry, sir, but there has been an accident some miles back and we don't know whether it was a maroon car, a black car or a pink car, we are just stopping all cars that look suspicious, and your headlight is broke or something." I sat in the car. He looked all around the car with his flashlight, and then he . . . I said, "Well, what's up?" He said, "Do you mind accompanying me to the police station?" I said, "Not at all." So we drove to the police station. When we got there I left the car at the curb and we walked inside. I said, "Can't we go to the Grant Hotel?" He said, "Well, if you don't mind we will wait here a while until the Highway Patrolman comes," whatever he said, I don't exactly remember about that particular part. I said, "Well, what is it, do [78] I have to be here?" He said, "Well, yes." So I then said, "Can I use the telephone?" He said, "Help yourself." I called the manager of the Grant Hotel and I said I am a little delayed, hold on to my room, I will be there shortly, little knowing that I wouldn't. We stood on the sidewalk and talked . . . do you want me to tell you—

Q. Yes, go ahead and tell us.

A. I stood on the sidewalk and talked to the police and waited and waited what seemed to be an hour or two later when along came the Highway Patrol, Patrolman, and he jumped out of his car and he came over, three or four policemen were standing there alongside me with their motorcycles in the road, and said, "Where is the job," "little job," or something, and they pointed to the car. This Highway Patrolman threw his finger at me and said, "Oh, boy, are you in for it." I said, "In for what?" He said, "You know for what." I am not going to argue with the law. I said, "What is going to happen? I don't know what the hell this is all about." I stood there waiting and waiting what seemed to be another hour, and he came out and took pictures of the car . . . oh, there before that come up, he said you know and so forth, he whipped out a pair of handcuffs and put them on me on the sidewalk. I said, "What is this for? I am only a little fellow, there are five or six policemen here, what do you expect me to do, what is this?" He said, "You will find out." I stood there with these handcuffs on me until they took the [79] pictures of the car and fooled around and finished and he came over and he took the handcuffs off, and during this time the motorcycle officer that stopped me was standing there. I says, "What is this? What happened?" "Well," he says, "it is very suspicious, it might have been your car that was in this accident." I said, "What happened, what happens now, what is the idea of the handcuffs?" He said, "Oh, don't pay any attention, those Highway Patrolmen" something, and when he finished with the pictures and everything the cop took the handcuffs off. He said, "Come on." I got in the car with them and I said, "Now



where do we go?" He said, "To the jail." We got to the County Jail and I asked the officer in the place, I said, "I have never been arrested before, isn't there something about bail? Do I have to be in here?" He said, "We can call a bondsman for you," and I said, "I wish you would, I would appreciate it." He started to call a bondsman and then this officer went into another room and I heard him telephoning and he came back and he said to the officer calling the bondsman, he said, "The Coroner says no bail." So the officer that was telephoning he said, "You heard that." I said, "Would you mind calling the man anyhow?" The bondsman finally came over. By that time it must have been three o'clock in the morning, three or three-thirty, I don't remember which, being quite upset, and I found out what happened. He said, "Well, it is kind of late to get a judge, just calm down if you don't mind, just [80] resign yourself and I will be here early in the morning. He got there around nine in the morning or nine-thirty, whatever it was.

Q. Sunday morning?

A. Sunday morning, yes, and got me out of jail, and that is that.

Q. At the time you talked to the officers did they tell you anything about the accident, what kind of an accident it was or whether anybody had been injured?

A. Yes, they said a man had been killed and a woman injured.

Q. What did you say to that?

A. I says, "Terrible."

Q. Did you at any time tell them you were or were not involved in an accident?

A. No. The only thing I told them was the headlight had been busted at the race track in Inglewood and if

there was anybody got killed or was in an accident I knew nothing about it.

Q. From the time that you first picked up the car, went to the race track, back to the hotel, and drove to San Diego was there anyone in the car with you?

A. No.

Q. Were you alone the whole time in the car?

A. Yes, I was.

Q. You didn't pick up any hitch-hikers on the street [81] or anything like that? A. No.

Q. Did you have anything to drink? A. No.

Q. Either at the race track, before you went there, or after you came back to the hotel? A. No.

Q. I mean by that drinking intoxicating liquors.

A. No.

Q. You didn't have any intoxicating liquor at any time between the time you left . . .

A. No, I don't drink much. It is not that important.

Q. You did not have anything to drink on the road?

A. No.

Q. You didn't have any whiskey, any open bottles of whiskey in the car did you?

A. I had a bottle I was bringing, which I usually do, to the, you know, manager of the hotel, Mr. McAfee, which I have brought him many many times. It is pretty hard to get a room down here and I have a friend down there where I can get it.

Q. The seal was still on that bottle? A. No.

Q. It wasn't A. No.

Q. How much was out of the bottle? [82]

A. I don't remember. Not much, very little.

Q. Now did anything else occur besides what you have told us here?

A. You asked me last night if they took and gave me a test or smelled my breath, such as that. There was nothing said at all about drinking.

Q. They didn't take you to a doctor and give you a sobriety test? A. No.

Q. They didn't make you walk a chalk line or a board on the floor or anything like that?

A. No, there wasn't the slightest inference of any drinking.

Q. No one accused you of drinking?

A. No, not a soul.

Q. Did the officers tell you how this accident happened? A. No, they didn't.

Q. Did you ask them?

A. No. All they told me was an accident; a man was killed and a woman seriously injured, something like that.

Q. Now did anything else occur that I haven't asked you about?

A. I have told you about all I know about it.

Q. You don't remember anything else at this time?

A. No, I don't.

Q. When you first came back to the car at the race [83] track did you go around to the left side of the car at all? A. No, I didn't.

Q. Was there any damage to the right hand side of the car? A. Not that I noticed.

Q. Now did you park the car when you went back to the Beverley Wilshire after you had been to the race track at the side entrance or the front entrance?

A. The side entrance.

Q. That is the north side, northwest side of the hotel?

A. You call that the west side. I always use that side, it is handiest to the elevator.

Q. At no time were you employed by the Northumberland Mining Company?      A. No.

Q. This trip you took in the car belonging to the Northumberland Mining Company was for your own desires and pleasures?      A. That is right.

Q. You have never been an officer, agent, servant or employee of the Northumberland Mining Company?

A. No.

Q. You weren't on any business or doing any errands for Mr. Haggerty?

A. None whatsoever. I come down here every Saturday night because I don't care to spend Sunday in Hollywood which [84] is a very quiet place. I like to go to Tia Juana and see the races have a bite there and I have been doing that ever since I have been in California, and I do it for my own pleasure. There was no business connected with it whatsoever.

Q. The only reason . . .

A. The only reason I borrowed the car was because my car was being repaired, and I told the man any time you want to borrow my car you are very welcome to it.

Q. You have known Mr. Haggerty for sometime?

A. About thirty years. He is a very find gentleman. I feel worse about his part of it. He is too sweet a person to hurt.

Q. Do you have insurance on your own car?

A. Yes.

Q. With whom is that insurance placed?

A. Through the Automobile . . .

Q. The Automobile Club of Southern California?

A. Yes.

Q. The Automobile Club of Southern California, you have a membership card number 916669. Thank you. You don't know the amount of your public liability coverage?

A. No, I don't.

Q. Have you reported it to them yet?

A. I haven't had a chance. I intend to the minute I get back.

Q. That bottle of whiskey was in the bag or in the [85] glove compartment?

A. In my overnight bag. The usual procedure with that is when I arrive if Mr. McAfee is here when I arrive I give him that as a little present because it is very hard to get reservations here, if you don't mind, and I wouldn't want to insult the man by offering any money. I know he likes to take a drink once in awhile, and even though this is a hotel the kind of liquor he likes they don't have it. A very good friend of mine operates the Vendome on Beverley Drive. He is a good friend of mine and any time I want a bottle for a friend or something I get it from him.

Q. There is one thing I am not quite clear about. When you came out of the race track after the last

race to the car, from which side did you approach the car, or from the front or the back or which direction?

A. Well, the car would be facing where I was coming from. I approached it from the front.

Q. The front end?

A. That is right, like that. You approach on an angle from the steps of the place, and the first thing you see is naturally the right side of the car. As I was approaching I saw the headlight, and then I got in the car and off I went.

Q. Did you examine it very thoroughly there?

A. No, I didn't.

Q. Did you go around to the left hand side of the car at all? [86]

A. No, I didn't.

Q. You just looked at the front.

A. I looked at the headlight and I said what is the use, there is nothing to examine. If you stay there half a minute there will be two hundred more cars in front of you, you know. That is the reason everybody wants to get out of there.

Q. Did you get up and look at the front end of the car? Did you get up near the center of the car in front of the radiator to look at it?

A. No, I just noticed the headlight and got in the car to get out of there.

Q. The whole time you remained on the right hand side of the car. . . .

A. I got in—

Q. . . . and got in on the right hand side.

A. That is right. In other words, I was standing where the right headlight, right fender was. That is as far as I had to go to see what happened. I didn't have to go anywhere else. I just got in the car.

Mr. Menzies: I think that is all. [87]

I, R. B. Whitcomb, do hereby certify that I am a Notary Public in and for the County of San Diego, State of California, and an official shorthand reporter of the Municipal Court, City of San Diego, County of San Diego, State of California; that before taking the statement of George White he was duly sworn to testify to the truth, the whole truth, and nothing but the truth; that I reported in shorthand the questions asked and the answers given as contained in the foregoing pages numbered from 1 to 23, inclusive, and that the foregoing is a full, true and correct transcript of the same.

R. B. WHITCOMB,  
Notary Public and Shorthand Reporter.

Received copy of the within Answers of Home Indemnity Company of New York, etc., this 25 day of November, 1946. Nourse & Jones, Attorneys for Defendant.

[Endorsed]: Filed Nov. 26, 1946.

Case No. .... vs. .... Plf. Exhibit.  
Date 1/20/47. No. 6 in Evidence (part of) entire statement. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [90]

[Title of District Court and Cause]

INTERROGATORIES PROPOUNDED BY DEFENDANT HOME INDEMNITY COMPANY OF NEW YORK, A CORPORATION, TO PLAINTIFF.

Under and in accordance with Rule 33 of the Federal Rules of Civil Procedure defendant Home Indemnity Company of New York, a corporation, propounds and requires that plaintiff, Standard Accident Insurance Company of Detroit, a corporation, answer the following interrogatories:

1. Was the information furnished the plaintiff by defendant George White, referred to in Paragraph XIII of plaintiff's complaint, given orally or in writing?

2. If your answer to Interrogatory No. 1 is that said information was in writing, attach a full, [91] true and complete copy of said writing.

3. If your answer to Interrogatory No. 1 is that said information was furnished orally, state the name and address of the persons present, and state the substance of said report or oral information so furnished the plaintiff.

4. State the time at which said information referred to in Paragraph XIII of said complaint was furnished the plaintiff.

5. State whether or not at any subsequent time any further information, either oral or in writing, concern-



ing the accident or collision referred to in plaintiff's complaint was furnished the plaintiff by said George White. [Written in margin]: Denied.

6. If your answer to Interrogaory No. 5 is in the affirmative, state when, and the name and address of the persons to whom said subsequent information was furnished. [Written in margin]: Denied.

7. State the substance of said subsequent information, if the same was furnished orally, or attach a full, true and correct copy if the same was furnished in writing. [Written in margin]: Denied.

THOMAS P. MENZIES and  
HAROLD L. WATT

By Thomas P. Menzies

Attorneys for Defendant Home Indemnity Company of  
New York, a Corporation [92]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Dec. 12, 1946.

Case No. 5729 O'C. Std. Accid. vs. Home Ind. Home Ind. Exhibit. Date 1/21/47. No. A in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [94]

[Title of District Court and Cause]

ANSWER TO INTERROGATORIES PROPOUNDED  
BY HOME INDEMNITY COMPANY OF NEW  
YORK TO PLAINTIFF

Under and in accordance with Rule 33, Federal Rules of Civil Procedure, plaintiff Standard Accident Insurance Company of Detroit hereby answers the interrogatories propounded by defendant Home Indemnity Company of New York:

1. In answer to the first interrogatory, it says the information was in writing.

2. In answer to the second interrogatory, it says that the following is a full, true and correct copy of the report containing the information referred to in the answer to Interrogatory No. 1:

“August 5, 1946.

Statement of George White, age 52

Address Beverly Wilshire Hotel, Beverly Hills, Calif.

Concerning accident that occurred on July 20, 1946. Approx. ? on highway 101 near Solano Beach, Calif. [95]

“I was driving Mr. Walter Haggerty Lincoln Sedan. The car is registered in name of Northumberland Mining Co. Mr. Haggerty is an officer of the Company. The Lincoln Sedan is registered in State of Nevada. I had full permission to drive the car from Los Angeles to San Diego as my car was in the repair shop.

"I left Los Angeles approx 6:30 P M on July 20, 1946 and drove at average rate of speed. At San Clemente Calif. at a Cafe / and had 2 cups of (drive in) coffee.

[end of first page] [Signed] George White

"Page 2

"I was alone in the car. I had driven on considerable distance, when I must have dozed off to sleep for a moment. The next thing I remember my car was at almost a stand still on the highway, I looked around a moment without getting out of the car then put car in low gear and proceeded on to San Diego. I had entered the City of San Diego when Officers stopped me and took me to Police Station without telling me what I was being taken in for except that there had been an accident and they were stopping all car.

"Later I was booked for hit & run and suspicion of manslaughter. Atty Thomas P. Menzies, 548 So Spring St and L. E. Clifton (Claim Adjuster) and representing the Home Indemnity Co. of New York, insurance carriers for the Northumberland Mining Co. My insurance with Standard Accident is on a 1942 Packard Coupe

[Signed] George White"

3. In answer to Interrogatory No. 4, plaintiff states that said information was furnished on August 5, 1946.

4. In answer to Interrogatories Nos. 5, 6 and 7, plaintiff states that no further statement or information was furnished to it by George White, except that after the

commencement of this action, [96] Paul Nourse, an attorney of record for this plaintiff in this action, did interview said George White at the San Diego County Industrial Road Camp, on the 9th of September, 1946, and that said George White did make an oral statement concerning the accident or collision referred to in the complaint on file herein, and this plaintiff claims that said statement so made to Paul Nourse was and is privileged.

STANDARD ACCIDENT INSURANCE  
COMPANY OF DETROIT

By Freeman Reed

District Claims Manager

NOURSE & JONES

By Paul P. Nourse

Attorneys for Plaintiff [97]

[Verified] [98]

[Affidavit of Service by Mail]

[Endorsed]: Filed Dec. 17, 1946. [99]

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[Minutes: Monday, December 23, 1946]

Present: The Honorable J. F. T. O'Connor, District Judge.

This cause coming on for (1) hearing on objections of the Standard Accident Insurance Co. of Detroit to interrogatories propounded by defendant Home Indemnity Co. of New York to plaintiff, pursuant to notice filed Dec. 17, 1946; and (2) hearing on oral objections of

plaintiff to request for admissions made by the Home Insurance Co. of New York, pursuant to notice filed Dec. 17, 1946; John Lindley, Esq., of the law firm of Nourse & Jones, appearing as counsel for the plaintiff; Thos. P. Menzies, Esq., appearing as counsel for the defendants:

Attorney Lindley argues re (1) said interrogatories and objects to interrogatories 5, 6, and 7. Attorney Menzies argues. The Court makes a statement, and orders that Interrogatories 5, 6, and 7 be answered by the Standard Accident Insurance Co. Attorney Lindley argues in opposition to request for admissions. Attorney Menzies makes a statement re admissions. The Court makes a statement. It is ordered that objections to interrogatories 5, 6, and 7 are overruled.

Attorney Lindley argues re (2) oral objections of plaintiff to request for admissions made by the Home Insurance Co., and Attorney Menzies argues. The Court makes a statement. With respect to the oral objections of the plaintiff to the request for admission made by the Home Insurance Co. of New York the Court states that it [100] is going to compel the plaintiff to answer the question with reference to the waiver, that the application for probation is a public document, and, if properly verified, will be admissible, and that the plaintiff will not be required to answer those requests other than the one indicated by the Court. Five days to answer. Notice is waived. [101]

[Title of District Court and Cause]

FURTHER ANSWER TO INTERROGATORIES  
PROPOUNDED BY HOME INDEMNITY  
COMPANY OF NEW YORK TO PLAINTIFF

Comes now plaintiff, Standard Accident Insurance Company of Detroit, and by leave of court first had files this its further answer to the interrogatories propounded to it by defendant, Home Indemnity Company of New York.

1. Answering Interrogatory No. 5, it answers, Yes.

2. Answering Interrogatory No. 6, it says: That an oral statement was made by George White to Paul Nourse, attorney for plaintiff whose address is 1017 Rowan Building, Los Angeles, California, on September 9, 1946; that the substance of said oral statement made to Paul Nourse on September 9, 1946, is as follows:

Mr. Menzies came to see me before I had a lawyer, I think the day after the accident happened. I was in a very upset state of mind. I told him the story as well as I could [102] remember it.

When I talked to him I would have sworn the car I was driving didn't hit anybody. By the time I had talked to John Holt and he showed the evidence that somebody had been hit or something, I told him it must have happened when I dozed off. He asked me if I had told Menzies that I dozed off, and I told him that I didn't know, that I thought I had, but I was not sure. So he told me to tell Menzies. I did tell Menzies, but I am not sure of the date, and I am not sure whether I told Menzies first or Holt did. At a later time, I do not remember the exact date, I was in Menzies' office, and I

again told him that I had dozed off and I wanted to put that in the statement I had given him.

When I first met Mr. Menzies it was in the Grant Hotel, and we talked for a long time until late at night. I was very upset, I didn't know what to do or where I was at and I thought I was being accused falsely. I believe that happened on Monday after the accident, although it might have been Sunday.

After our first talk, I met him at 9:00 o'clock the next morning in his room and he had a stenographer there. He told me to tell him what had happened, and I told him to the best of my knowledge, but I didn't tell him I had dozed off. At that time I was convinced that I hadn't hit anybody, and the fact that I had dozed off on my trip didn't seem important. As I now remember it what occurred is as follows:

On Saturday, July 22, 1946, I met Audrey Young and her father at the Beverly-Wilshire Garage. I was driving Walter Haggerty's car. Audrey got in and we drove to the Inglewood race track. I parked the car in the Turf Club parking area. In my haste to get to the first race, I forgot to take the key out of the car. After the last race we rushed out to beat the traffic, which is quite terrific on Saturdays. We went to [103] the spot where I had parked the car, but it was not in that place, but seemed to be about a dozen yards or so further down. As I approached the car I noticed the glass in the left headlight was broken. I wasn't sure whether it had been broken in the parking station or the night before, although I hadn't noticed it.

I dropped Miss Young off on Wilshire and Rodeo, and drove to the side entrance of the Beverly-Wilshire Hotel.

I went up, washed up, packed an overnight bag, and left for San Diego at about 6:30 P. M. I stopped and picked up sandwiches at Nate and Lou's Delicatessen on Beverly Drive, and I bought a San Diego Examiner from a newsboy at the Brown Derby corner. I drove over to Olympic and then on Overland Avenue to Sepulveda. I ate my sandwiches and drank some coca cola and kept going until I got to San Clemente, where I stopped at a drive-in and drank two cups of coffee. I felt a little tired from running up and down steps at the races, but did not feel sleepy.

Suddenly I came to, I realized I must have dozed off. My car was moving very slowly, it was pitch dark and there wasn't a person in sight. I grabbed the wheel, shifted into low gear, and rolled on again. I thought at the time, its a wonder I didn't run off the road, and how lucky I was to avoid an accident. I didn't know where I was at the moment, but shortly after that I saw familiar parts of the road, the northern entrance to the Del Mar race track.

I stopped at the Del Mar Hotel to see if Lew Irwin was there. He had told me a few days previous he was connected with the Hotel. I wanted to arrange to stay there for the Del Mar race meet. On arriving at the Del Mar Hotel I left my car in the driveway, I looked in the bar, in the lobby and around the grounds and did not find Lew Irwin. I was probably there about 10 or 15 minutes. I got back into my car on the righthand [104] side and continued on to San Diego. I did not at any time that evening go around in front of my car. I always get out the right side, it is dangerous otherwise.



I continued on towards San Diego at a fairly slow rate of speed with my radio on very loud so I wouldn't doze again. As I approached San Diego a motorcycle followed me. I saw the red lights through the mirror as he approached. I pulled over to the side of the road and he came up. I said, "What's up, I certainly am not speeding." He said, "No, it is not that; there has been an accident some miles back, and we are stopping all cars that look suspicious. Your headlight is damaged." I said, "That was done at Santa Anita." I meant to say, "Inglewood." I was still sleepy. The officer took out his flashlight and walked to the front of the car and examined it. I sat in the car. The officer said, "Your car looks kind of suspicious. Would you mind accompanying me to the police station?" I told him "Not at all, I will be glad to." I drove to the police station and stopped near the corner of the station. There were several motorcycles in front of the door. It was very dark there. I got out on the righthand side. An officer told me we would have to wait until the Highway Patrolman arrived. I called the Assistant Manager of the U. S. Grant Hotel and told them to hold my room, that I would be there in about 20 minutes. That was about 11:00 P. M. Sometime later, it seemed a couple of hours, the Highway Patrolman arrived, and he ran over to me and said, "Is this him?" And then to me he said, "Oh, boy, are you in for it." I said, "I don't know what the hell you are talking about." He says, "What about those two people you hit on the highway? Fifteen years in San Quentin for you." He put a pair of handcuffs on me. After some time a wrecking car arrived and towed my car away. I still did not see any damage to the car

because the [105] damage was all on the left side and that was not visible to me at any time.

After I had left the car at the corner of the station I was not closer to it than about 20 feet and its right side was towards me.

The Highway Patrolman took me to the County Jail and I was booked. They told me the Coroner said no bail was to be allowed until he had investigated. I stayed in jail until the next morning when bail was arranged.

When I stopped at the Del Mar Hotel I didn't see anyone I knew.

I had nothing to drink at all on the evening of the accident, nor at the races. I had two bottles of liquor in the car, one partially filled, and I was bringing it down to Mr. Val, the other bottle was for Mr. McAfee. I only take a drink about once a month.

I was arraigned on Monday morning.

I was all alone on the trip down from Los Angeles to San Diego.

Mr. Menzies did not give me a copy of the transcript of my statement which was taken at the Hotel Grant. He wanted me to sign a copy of it in his office, but I told him that Mr. Holt had told me not to sign anything unless he saw it.

Mr. Menzies sent to my attorney, Mr. Holt, answers for me to sign in the suits that were brought against me. As I remember it, these contained statements that I had not struck these people, but by that time I knew I had and I wouldn't sign them. Mr. Holt advised me not to sign them.

When I woke up on the highway my car was on the righthand side, moving along very slow, that is my best recollection.

When I got into the car after the races it was broad daylight, so I didn't have to turn the lights on. The damage [106] to the headlight that I saw at the races was only a crack of the headlight. It was nothing like the damage to the headlight which was shown in the pictures of the car in the newspaper.

After I woke up I didn't notice any difference in the light from my headlights. I might have been groggy or something. I was very tired, I had worked until 3:00 or 4:00 o'clock in the morning on Saturday morning. I was preparing a show and I do a good deal of the writing of my shows, in fact most of it. I only had four or five hours sleep. After I awoke after dozing off, I drove on at a speed of 25 or 30.

I had a talk with the Probation Officer at San Diego before my probation hearing. He said that it might go easier with me if I would admit that I knew that I hit these people, and asked me if I didn't feel anything even though I had fallen asleep. He asked if it wasn't the impact that woke me up, and I said "Evidently it was." He said, "You know, if you tell the truth it will be much simpler for you," or words to that effect, and I told him that if he had the Judge and the District Attorney right there and they would say I would go free if I said

I knew I hit the people, I would say, "O. K., I hit the people, but I am lying when I tell you I knew I hit them."

When I gave my statement to Mr. Menzies I had not seen the pictures of the car. When he took my statement he said he was there to help me, that I should tell him everything I could, tell him the truth, that no matter what I told him it would be just between he and I. I didn't tell him I had fallen asleep because that didn't seem important to me then, but after I saw the pictures of the car I was convinced that it was my car that hit the people, and the only way I could account for it was that it hit them when I dozed off. I am not sure when I first told Menzies I had dozed off, but it was before any answers to the state court suits were prepared, and I also [107] told him before they were prepared that I believed it was my car that had hit the people.

Dated: December 27, 1946.

NOURSE & JONES

By Paul Nourse

Attorneys for Plaintiff [108]

[Verified] [109]

[Affidavit of Service by Mail]

[Endorsed]: Filed Dec. 28, 1946.

Case No. 5729 Civ. .... vs. .... Deft. Exhibit. Date 1/20/47. No. A in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [110]

[Title of District Court and Cause]

REQUEST FOR ADMISSIONS UNDER RULES OF  
CIVIL PROCEDURE—RULE 36

To the Plaintiff, Standard Accident Insurance Company  
of Detroit, a Corporation, and

To Nourse and Jones, Its Attorneys:

The defendant Home Indemnity Company of New York, a corporation, hereby requests the plaintiff, Standard Accident Insurance Company of Detroit, a corporation, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial.

1. That each of the following statements is true:

- (a) That defendant George White gave Home Indemnity Company of New York, a corporation, a statement [111] concerning the cause of the accident referred to in plaintiff's complaint.
- (b) That said statement was made on July 23, 1946, in the presence of Mr. Thomas P. Menzies, Mr. L. E. Clifton and Mr. R. B. Whitcomb.
- (c) That prior to making said statement defendant George White was sworn by said R. B. Whitcomb to testify to the truth, the whole truth and nothing but the truth.
- (d) That the statement of said defendant George White was reported in shorthand by the said R. B. Whitcomb and thereafter transcribed.

- (e) That the transcript of said statement furnished the plaintiff in answer to Interrogatory No. 10 of plaintiff's interrogatories to this defendant is a full, true and correct copy of said transcribed statement of defendant George White, and is a full, true and correct copy of the transcript of the statement so made by defendant George White on July 23, 1946.

2. That in a hearing on application for probation held August 23, 1946, in the Superior Court of the State of California, in and for the County of San Diego, in the Matter of the People of the State of California, Plaintiff, vs. George White, Defendant, before Honorable Judge Joe L. Schell of the Superior Court, the defendant, George White, stated as follows:

- (a) That it was a fact that he was unaware that he (the said White) had hit anybody in the vicinity of Solano Beach.
- (b) That "I fell asleep; that is a fact."
- (c) That he (the said White) did not at the time notice the indentation on the hood of his car. [112]
- (d) That he did not notice the condition of the headlight on his car.
- (e) That he did not know that he had hit anybody.
- (f) That at said proceedings on the hearing on application for probation the said Superior Court Judge Honorable Joe L. Schell said to the defendant George White, "How can we do otherwise than to say that Mr. White knew that he hit somebody, and that he drove off."

That defendant George White made no response to the statement of said Superior Court Judge.

3. That defendant George White stated orally to Thomas P. Menzies, Esq., and L. E. Clifton, Esq., on July 22, 1946, at San Diego, California, that he (the said White) had not been involved in an accident and had no knowledge of having struck anyone with the automobile which he was operating.

4. That the statement referred to in the preceding paragraph is false.

5. That the said George White on July 23, 1946, made the following false statements in connection with and as a part of his sworn statement before R. B. Whitcomb:

- (a) That the damage to the left front fender of the car of the Northumberland Mining Co., which defendant White was driving, occurred at the Hollywood Park Race Track.
- (b) That when he (the said White) came out of the Race Track the left headlight was broken and bashed in and that the damage to the car of the Northumberland Mining Co. was done while the car was parked at the Hollywood Park Race Track.
- (c) That between the time he (the said White) left [113] a drive-in stand in the City of San Clemente and the time that he arrived in the City of San Diego, he did not hit any pedestrian or other object on the road.
- (d) That between the time he (the said White) left San Clemente and the time that he left the Del Mar Hotel in Del Mar, California, he was not involved in any traffic accident.

- (e) That the automobile operated by him (the said White) did not collide with any object or individual person.
- (f) That he (the said White) did not know that he had hit anyone.
- (g) That if anybody got killed it was an accident and he (the said White) did not know anything about it.
- (h) That "I have told you all I know about it."

6. That on July 26, 1946, defendant The Home Indemnity Company of New York entered into an agreement of non-waiver and reservation of rights with the defendant George White in writing, in words and figures as per Exhibit "A" attached hereto and made a part hereof.

7. That said agreement of non-waiver and reservation of rights was executed prior to The Home Indemnity Company of New York filing, or causing to be filed, answer on behalf of George White in Superior Court Actions No. 134918 and No. 134630 in the Superior Court of San Diego County.

Dated this 11th day of December, 1946.

THOMAS P. MENZIES and  
HAROLD L. WATT

By Thomas P. Menzies

Attorneys for Defendant Home Indemnity Company of  
New York, a Corporation [114]

### EXHIBIT "A"

### AGREEMENT OF NON-WAIVER AND RESERVATION OF RIGHTS

It Is Hereby Mutually Agreed, by and between The Home Indemnity Company of New York, and George



White, under their Policy No. CAU 6011452, that in the signing of this agreement, or the investigation or defending of any action at law or in equity arising out of an accident which is alleged to have occurred on or about the 20th day of July, 1946, in the County of San Diego, near Solano Beach, and that in investigating any and all of the facts and circumstances surrounding said accident, and any and all claims of any and every nature whatsoever for personal injuries and property damage arising out of said accident, each party to this agreement specifically reserves unto themselves each and every right and defense which either may have pursuant to the terms and conditions of the above numbered policy of insurance; and that neither party to this agreement shall waive or invalidate any of the terms or conditions of said policy or policies of insurance, and shall not waive or invalidate any rights which either may have of any nature whatsoever, and that each party to this agreement specifically reserves each and every and all and singular rights and defenses which each may have by reason of the terms and conditions of said policy or policies of insurance above numbered herein.

Dated this 26th day of July, 1946, at Los Angeles, California.

THE HOME INDEMNITY COMPANY  
OF NEW YORK

By L. E. Clifton

George White

(George White) [115]

[Affidavit of Service by Mail]

[Endorsed]: Filed Dec. 12, 1946. [117]

[Title of District Court and Cause]

ANSWER OF PLAINTIFF TO REQUEST FOR  
ADMISSIONS UNDER RULES OF CIVIL PRO-  
CEDURE—RULE 36

Comes now plaintiff, Standard Accident Insurance Company of Detroit, a corporation, and in answer to Request for Admissions heretofore served and filed by Home Indemnity Company of New York, makes answer as follows:

1(a). To Request 1(a) this plaintiff answers that it is informed and believes that the defendant George White gave defendant Home Indemnity Company of New York a statement concerning the causes of action referred to in plaintiff's complaint.

1(b). To Request 1(b) this plaintiff says that a statement was not made in its presence or in the presence of any of its officers, attorneys, agents or employees, and it therefore does not know and cannot truthfully state whether or not said statement was made on July 23, 1946, or whether the same was made in the presence of Thomas P. Menzies, L. E. Clifton, or R. B. Whitcomb. [118]

1(c). To Request 1(c) this plaintiff states that neither it nor any of its servants, agents, employees or attorneys were present at the making of said statement, and therefore it cannot state whether or not prior to making said statement George White was sworn by R. B. Whitcomb to testify to the truth, the whole truth, and nothing but the truth.

1(d). To Request 1(d) this plaintiff says that it has no information as to whether or not said statement was

reported in shorthand by R. B. Whitcomb and thereafter transcribed, except that it is so informed by the Answers of defendant Home Indemnity Company of New York to the interrogatories propounded by this plaintiff.

1(e). To Request 1(e) this plaintiff states that it has no information relative to whether or not the transcript attached to defendant Home Indemnity Company's Answers to Interrogatories and Answer to Interrogatory No. 10 is a full, true and correct copy of the transcribed statement of defendant George White, but this plaintiff offers to stipulate at the trial of this action, that if the original transcript of said statement certified to by said R. B. Whitcomb, Notary Public and shorthand reporter, is produced by defendant Home Indemnity Company of New York, that said Whitcomb, if called as a witness, would testify that said transcript is a full, true and correct copy of the questions propounded to George White and answers given by George White on the 23rd day of July, 1946, and that said questions and answers were asked and given.

2(a), (b), (c), (d), (e), (f). To Requests 2(a) to (f), inclusive, this plaintiff states that neither it nor any of its agents, servants, employees or attorneys were present at the application for probation held on August 23, 1946, in the Superior Court of the State of California, in and for the County of San Diego, in the Matter of the People of the State of California, Plaintiff v. George White, defendant, and that therefore it has no knowledge as to whether or not the statements recited in said request for admissions were made or not made. [119]

If a transcript of all of the proceedings had at said hearing on application for probation, certified to by the

official Court Reporter present at said hearing, is produced at the trial of the above entitled action, this plaintiff will stipulate that the questions shown by said transcript as asked and the answers given to the questions and any statements made by the court, attorneys, officers or witnesses, were made at said hearing, reserving however, the right to object to the admissibility of said questions, answers or statements in evidence at the trial of this action, upon the grounds that the matter offered in evidence is irrelevant, upon the grounds that it is immaterial, upon the grounds that it is hearsay, and upon the grounds that it calls for a conclusion of the witness, with the same force and effect as if the persons asking the questions, making the answers, or making the statements offered were present as witnesses.

3. To Request 3 this plaintiff states that neither it nor any of its agents, servants, employees or attorneys were present at the occurrence described in Request No. 3, and therefore it has no knowledge as to whether or not the statements therein alleged to have been made by White were made, and therefore cannot under oath state whether or not they were made.

4. To Request 4 this plaintiff states that if defendant George White made the statement recited in Request for Admission No. 3, it cannot state whether or not said statement was false or untrue, but this plaintiff is informed that if White made the statement that he had not been involved in an accident, that statement was untrue, but that if he made the statement that he had no knowledge of having struck anyone with the automobile which he was operating, that that statement was true. [120]

5(a), (b), (c), (d), (e), (f), (g), (h). To Requests 5(a) to (h), inclusive, this plaintiff states that if George White made the statements which are recited in said Requests for Admission, this plaintiff is unable to state whether or not said statements were false or untrue, and this plaintiff further states that the question as to whether or not said statements were false or untrue is one of the direct issues of fact to be determined by the court herein from all of the evidence.

6 and 7. To Requests 6 and 7 this plaintiff says that it has no knowledge whatsoever as to the instrument annexed to the Request for Admissions, marked Exhibit A, or as to the execution thereof; that it has not seen said instrument and is therefore unable to state whether or not the copy attached is a true copy of an original instrument, or whether or not the original thereof was executed by George White, or of the circumstances under which the same, if executed, was executed.

STANDARD ACCIDENT INSURANCE  
COMPANY OF DETROIT

By Freeman Reed

District Claims Manager

NOURSE & JONES

By Paul Nourse

Attorneys for Plaintiff [121]

[Verified] [122]

[Affidavit of Service by Mail]

[Endorsed]: Filed Dec. 17, 1946. [123]

[Title of District Court and Cause]

ANSWER TO REQUEST FOR ADMISSIONS  
FILED BY DEFENDANT HOME INDEMNITY  
COMPANY OF NEW YORK

To Defendant, Home Indemnity Company of New York,  
and

To Messrs. Thomas P. Menzies and Harold L. Watt, Its  
Attorneys, Notice:

Comes now plaintiff, Standard Accident Insurance Company of Detroit, and by leave of court first had files this its further answer to the Request for Admissions heretofore filed by defendant, Home Indemnity Company of New York:

1. Answering the 6th request for admissions, states: That it has not seen and has no knowledge of the instrument, an alleged copy of which is annexed to said Request for Admissions and marked Exhibit A, except that it is advised by the attorneys for defendant, Home Indemnity Company of New York, that such an instrument was executed by defendant, Home Indemnity Company of New York, and defendant, George White; and on the basis of such information and [124] in order to comply with the ruling of the court herein, admits that said instrument was so executed.

2. Answering the 7th request for admissions, this plaintiff admits that if Exhibit A attached to the Request for Admissions filed by defendant Home Indemnity Company of New York herein was executed on the 26th day of July, 1946, it was executed prior to the filing of the answers on behalf of George White in the Superior

Court actions Numbers 134918 and 134630 in the Superior Court of San Diego County.

Dated: December 27, 1946.

NOURSE & JONES

By Paul Nourse

Attorneys for Plaintiff [125]

[Verified] [126]

[Affidavit of Service by Mail]

[Endorsed]: Filed Dec. 28, 1946. [127]

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[Title of District Court and Cause]

REQUEST FOR ADMISSIONS UNDER RULE 36,  
FEDERAL RULES OF CIVIL PROCEDURE

To Defendant, Home Indemnity Company of New York,  
a corporation, and

To Messrs. Thomas P. Menzies and Harold L. Watt,  
Its Attorneys:

Plaintiff hereby requests that within not more than ten days from the date of the service of this Request, defendant Home Indemnity Company of New York make the following admissions for the purposes of this action only, and subject to all pertinent objections as to admissibility which may be interposed at the trial:

1. That the instrument attached hereto and marked "Exhibit A" is a full, true and correct copy of an answer which said defendant requested the defendant, George White, to sign and verify in that certain action in the

Superior Court of the State of California, in and for the County of San Diego, entitled "James Carl Fitzgerald v. George White, et al.," numbered 134630 in the files of said court. [128]

2. That said defendant, George White, refused to verify said answer annexed hereto and marked "Exhibit A," and informed the defendant, Home Indemnity Company of New York, or its attorney, Thomas P. Menzies, Esq., that he would not verify the same because it denied the occurrence of the accident which is described in the complaint in said action.

3. That the instrument annexed hereto and marked "Exhibit B" is a full, true and correct copy of an answer signed and verified by said defendant, George White, in said action in the Superior Court of the County of San Diego, which is referred to and described in Request No. 1.

4. That said Exhibit B, after being signed and verified by George White, was delivered by him or in his behalf to Thomas P. Menzies, Esq., an attorney employed by defendant, Home Indemnity Company of New York, to defend said action.

5. That said Thomas P. Menzies, Esq., caused said answer, Exhibit B, to be filed in the action in which it is entitled.

6. That the instrument annexed hereto, made a part hereof and marked "Exhibit C," is a full, true and correct copy of the complaint filed in the action in the Superior Court of the County of San Diego, which is referred to and described in Request No. 1.

7. That the instrument attached hereto and marked "Exhibit D" is a full, true and correct copy of an answer



which said defendant requested the defendant, George White, to sign and verify in that certain action in the Superior Court of the State of California, in and for the County of San Diego, entitled "Michael Lee, a minor, and Patricia Lee, a minor, by Mildred E. Taylor, their guardian ad litem, Plaintiffs v. George White, et al., Defendants," numbered 134918 in the files of said court.

8. That said defendant, George White, refused to verify said answer annexed hereto and marked "Exhibit D," and informed the defendant, Home Indemnity Company of New York, or its attorney, [129] Thomas P. Menzies, Esq., that he would not verify the same because it denied the occurrence of the accident which is described in the complaint in said action.

9. That the instrument annexed hereto and marked "Exhibit E" is a full, true and correct copy of an answer signed and verified by said defendant, George White, in said action in the Superior Court of the County of San Diego, which is referred to and described in Request No. 7.

10. That said Exhibit E, after being signed and verified by George White, was delivered by him or in his behalf to Thomas P. Menzies, Esq., an attorney employed by defendant, Home Indemnity Company of New York, to defend said action.

11. That said Thomas P. Menzies, Esq., caused said answer, Exhibit E, to be filed in the action in which it is entitled.

12. That the instrument annexed hereto, made a part hereof and marked "Exhibit F," is a full, true and correct copy of the complaint filed in the action in the Su-

perior Court of the County of San Diego, which is referred to and described in Request No. 7.

13. That in connection with the accident described in the complaint on file herein the District Attorney of the County of San Diego, State of California, did issue a complaint in an action entitled, "People of the State of California v. George White," charging George White with a violation of Section 480 of the Vehicle Code of the State of California, and that on the 31st day of July, 1946. George White did enter a plea of "Guilty" to said charge.

14. That at the time of requesting defendant, George White, to verify the answers annexed hereto and marked, respectively, "Exhibit A" and "Exhibit D," the defendant, Home Indemnity Company of New York, and its attorney, Thomas P. Menzies, Esq., knew that the plea of "Guilty" referred to in Request No. 13 had been entered by the defendant, George White. [130]

15. That the copy of a letter annexed hereto and marked "Exhibit G" is a true and correct copy of a letter written by Thomas P. Menzies to the defendant herein, George White.

16. That the copy of a letter annexed hereto and marked "Exhibit H" is a full, true and correct copy of a letter written by Thomas P. Menzies to John T. Holt.

17. That the copy of a letter annexed hereto and marked "Exhibit I" is a full, true and correct copy of a letter written by Thomas P. Menzies to defendant herein, George White.

18. That the copy of a letter annexed hereto and marked "Exhibit J" is a full, true and correct copy of

a letter written by John T. Holt to Thomas P. Menzies and received by Thomas P. Menzies.

19. That neither you nor Thomas P. Menzies made any reply to the letter of John T. Holt annexed hereto and marked "Exhibit J."

20. That at all times from July 20, 1946, to and including August 23, 1946, Thomas P. Menzies was acting as attorney for you.

21. That in writing the letters annexed hereto and marked "Exhibit G" and "Exhibit H" and "Exhibit I," Thomas P. Menzies was acting in your behalf.

22. That John T. Holt was, on the 23rd day of August, 1946, attorney for defendant herein, George White, and as such attorney and on behalf of George White, wrote to you the letter, copy of which is annexed hereto, marked "Exhibit J."

23. That the statement in the letter, copy of which is annexed hereto, marked "Exhibit J,"

"As you will remember, he has demanded of you on numerous occasions that you present to him the first statement you took from him to make corrections."

is a true statement of the facts related therein. [131]

24. That the statement in the letter, said Exhibit J, that:

"\* \* \* several days after this and a very short the first statement that he had made to you that he remembered falling asleep and having awakened while driving the car and that the accident could have happened then."

is a true statement of the statements made to you by George White and of the time of the making of said statements.

25. That the statement in said letter, marked "Exhibit J," herein, that:

"\* \* \* several days after this and a very short time after the accident itself, you and I talked by telephone and I asked you to remember the conversation, which I am sure you do, at which time I reiterated over and over again that George White had stated to me and wanted it again relayed to you that he had fallen asleep at or near the scene of the accident and that he may have hit the people at that time without his knowledge."

is a true statement as to the facts related to you through your attorney, Thomas P. Menzies, Esq., over the telephone at the time indicated in the quoted statement.

26. That the defendant, Home Indemnity Company of New York, is now and has at all times since the 19th day of July, 1946, been solvent and financially able to pay the claims made against George White by plaintiffs in actions numbers 134630 and 134918 in the Superior Court of the State of California, in and for the County of San Diego, as set forth in the copies of the complaints in said actions, Exhibits C and F annexed hereto.

Dated: December 23, 1946.

NOURSE & JONES

By Paul Nourse

Attorneys for Plaintiff [132]

EXHIBIT A

In the Superior Court of the State of California,  
in and for the County of San Diego

No. 134630

James Carl Fitzgerald, a minor, by and through his  
Guardian ad Litem, James Richard Osborne, and James  
Richard Osborne, Plaintiffs, vs. George White and North  
Lumberland Mining Company, Defendants.

ANSWER OF DEFENDANT GEORGE WHITE

Comes now the defendant George White and answer-  
ing for himself only the plaintiffs' complaint on file here-  
in, admits, denies and alleges as follows, to-wit:

I.

Answering Paragraph I of plaintiffs' complaint defend-  
ant has not sufficient information or belief upon which  
to base an admission or denial of the allegations con-  
tained in said Paragraph I and basing his denial upon  
those grounds denies each and every and all and singular  
the allegations contained in said Paragraph I, save and  
except the allegation that James Richard Osborne is the  
Guardian Ad Litem of said minor plaintiff.

II.

Answering Paragraph II defendant denies each and  
every [133] and all and singular the allegations contained  
in said Paragraph II, save and except that this answer-  
ing defendant admits that the Northumberland Mining  
Company was the owner of said automobile described in  
said paragraph and that the defendant was operating  
said automobile with the consent of the president of said  
company.

## III.

Answering Paragraph III of plaintiffs' complaint defendant denies that on July 20, 1946, or at any other time or at all, in the County of San Diego, State of California, on U. S. Highway No. 101, at and near Solano Beach, or in the County of San Diego, State of California, or elsewhere, or at all, on U. S. Highway No. 101, at and near Solano Beach, or on U. S. Highway No. 101, at or near Solano Beach, or elsewhere or at all, the defendant George White did carelessly, recklessly and negligently, or did carelessly or recklessly or negligently, drive, steer, operate and cause to be propelled, or drive or steer or operate or cause to be propelled, the said automobile into, upon and against, or into or upon or against, one Leana Mae Osborne Lee, the mother of plaintiff James Carl Fitzgerald. Denies that as a result, proximate or otherwise, of which carelessness, recklessness and negligence, or which carelessness or recklessness or negligence, the said Leana Mae Osborne Lee was caused to and did suffer her death, or was caused to or did suffer her death.

## IV.

That this defendant has not knowledge, information or belief sufficient to enable him to answer the allegations in Paragraph IV of said complaint and basing his answer on that ground denies the same.

## V.

Answering Paragraph V of plaintiffs' complaint defendant denies each and every and all and singular the [134] allegations contained in Paragraph V. Denies that the minor plaintiff was damaged in the sum of Fifty Thousand Dollars (\$50,000.00) or any other sum whatsoever by reason of any acts whatsoever of this answering defendant.

Answering Paragraph I of plaintiffs' second cause of action, defendant hereby refers to and adopts as his answer the denials and allegations heretofore set forth in said defendant's answer to said Paragraphs II and III of the first cause of action herein as fully as though herein set out at length.

Answering Paragraph II of plaintiffs' second cause of action, defendant has not knowledge, information or belief sufficient to enable him to answer and basing his answer on that ground denies generally and specifically, each and every, all and singular, the allegations contained in paragraph numbered II of plaintiffs' second cause of action.

Further Answering Plaintiffs' Said Complaint and for a Separate and First Special Defense Thereto, This Answering Defendant Alleges:

I.

That if the plaintiffs sustained damages in the particulars in their complaint set out, or otherwise, that the same occurred proximately and directly through and by reason of the negligence of the decedent in failing to exercise due or any care or caution for her own safety. Wherefore, defendant prays that the plaintiffs take nothing by their said action and that defendant have and recover his costs of suit herein expended.

THOMAS P. MENZIES and  
HAROLD L. WATT

By.....

Attorneys for Defendant George White

Case No. .... vs. .... Plf. Exhibit. Date 1/21/47. No. 12 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [135]

## EXHIBIT B

In the Superior Court of the State of California  
in and for the County of San Diego

No. 134630

James Carl Fitzgerald, a minor, by and through his  
Guardian ad Litem, James Richard Osborne, and James  
Richard Osborne, Plaintiffs, vs. George White, and North  
Lumberland Mining Company, Defendants.

## ANSWER OF DEFENDANT GEORGE WHITE

Comes now the defendant, George White, and answer-  
ing the complaint on file herein for himself and not on  
behalf of his co-defendant, admits, denies and alleges as  
follows, to-wit:

## I.

Alleges that this defendant has not information or  
belief sufficient to enable him to answer the allegations  
of paragraphs I, IV and V of the first alleged cause  
of action and paragraph II of the second alleged cause  
of action of the complaint on file herein, and for want  
of such information and belief and basing his denial on  
that ground denies each and all of the allegations of said  
paragraphs and the whole thereof.

## II.

Denies that the plaintiff, James Carl Fitzgerald has  
been damaged in the sum of Fifty Thousand Dollars  
(\$50,000.00), or in [136] any sum, or at all; denies that  
the plaintiff James Richard Osborne has been damaged  
in the sum of Five Hundred Dollars (\$500.00), or in  
any other sum, or at all.



### III.

Answering paragraph II of the first alleged cause of action set forth in the complaint on file herein, this defendant denies generally and specifically each and all of the allegations of said paragraph, except this defendant admits that the Lincoln Zephyr automobile described in said paragraph was at the time of the accident described in the complaint, owned by the defendant, North Lumberland Mining Company, and this defendant was at the time and place of the accident driving said automobile with the full knowledge and consent of said North Lumberland Mining Company.

### IV.

Answering paragraph III of the first alleged cause of action of the complaint on file herein this defendant denies generally and specifically each and all of the allegations of said paragraph, except that this defendant admits that the automobile driven by him did at or about the time and place described in the complaint, collide with Leana Mae Osborne Lee and that as a result of said collision Leana Mae Osborne Lee died, and except that this defendant has not information and belief sufficient to enable him to answer the allegations of said paragraph that said Leana Mae Osborne Lee was the mother of the plaintiff, James Carl Fitzgerald, and for want of such information and belief and basing his denial on that ground denies that Deana Mae Osborne Lee was the mother of the plaintiff, James Carl Fitzgerald.

And for a Further and Separate Defense to Each of the First and Second Causes of Action Set Forth in the Complaint on File Herein This Defendant Alleges: [137]

I.

That if the plaintiffs sustained damages in the particulars in their complaint set out, or otherwise, that the same occurred proximately and directly through and by reason of the negligence of the decedent in failing to exercise due or any care or caution for her own safety.

Wherefore, defendant prays that the plaintiffs take nothing by their said action and that this defendant have and recover his costs of suit herein expended.

THOMAS P. MENZIES and  
HAROLD L. WATT

By [Signed] Thomas P. Menzies  
Attorneys for Defendant George White

State of California,  
County of Santa Diego.—ss

George White, being first duly sworn, deposes and says:

That he is one of the defendants in the above entitled action; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

[Signed] GEORGE WHITE

Subscribed and sworn to before me this 23rd day of August, 1946.

[Signed] GAYLE H. DAVIS  
Notary Public in and for said County and State [138]

EXHIBIT C

In the Superior Court of the State of California  
in and for the County of San Diego

No. 134630

James Carl Fitzgerald, a minor, by and through his  
Guardian ad litem, James Richard Osborne, and James  
Richard Osborne, Plaintiffs, vs. George White and North  
Lumberland Mining Company, Defendants.

COMPLAINT

FIRST CAUSE OF ACTION

Plaintiff James Carl Fitzgerald complains and alleges:

I.

That plaintiff James Richard Osborne is the grand-  
father of plaintiff James Carl Fitzgerald; that said last  
mentioned plaintiff is a minor of the present age of  
eighteen months; that plaintiff James Richard Osborne  
is the duly appointed and acting guardian ad litem of  
said minor plaintiff herein.

II.

That at all times herein mentioned, defendant North  
Lumberland Mining Company was the owner of a certain  
Lincoln Zephyr automobile driven, steered, operated and  
caused to be propelled with the full knowledge, consent  
and permission of said defendant company by defendant  
George White, and that the said defendant George White  
was at all times herein mentioned the servant, agent and  
employee of the said defendant company acting within  
the scope of his agency and authority as such servant,  
agent and employee.

## III.

That on July 20, 1946, in the County of San Diego, State of California, on U. S. Highway No. 101, a public highway, at and near [139] Solano Beach, defendant George White did carelessly, recklessly and negligently drive, steer, operate and cause to be propelled the said automobile into, upon and against one Leana Mae Osborne Lee, the mother of plaintiff James Carl Fitzgerald as a proximate result of which carelessness, recklessness and negligence the said Leana Mae Osborne Lee was caused to and did suffer her death.

## IV.

The said minor plaintiff James Carl Fitzgerald is the sole heir at law of the said Leana Mae Osborne Lee.

## V.

That by reason of the foregoing said minor plaintiff has been deprived of the society, services, comfort, support, nurture, counsel guidance, protection and ability in training, educating and rearing him, to his great loss and damage in the sum of Fifty Thousand Dollars (\$50,000.00).

## SECOND CAUSE OF ACTION

## I.

Plaintiff hereby refers to and adopts as part of this, the second cause of action, each and all of the allegations in paragraphs II and III of the first cause of action herein.

## II.

That plaintiff James Richard Osborne is the father of the said Leana Mae Osborne Lee, deceased; that the said Leana Mae Osborne Lee was at all times herein mentioned a minor of the age of 18 years; that by reason

of the foregoing, this plaintiff has been obliged to incur and he has incurred liability and expense for the preparation of the body of the said Leana Mae Osborne Lee for burials and for her funeral and burial in an amount which said plaintiff is informed and believes and therefore alleges to be in the sum of Five Hundred Dollars (\$500.00) the reasonable value thereof.

Wherefore, plaintiffs pray judgment against the defendants, and each of them, as follows: [140]

1. In favor of plaintiff James Carl Fitzgerald in the sum of Fifty Thousand Dollars (\$50,000.00) by virtue of the first cause of action herein, and

2. In favor of the plaintiff James Richard Osborne in the sum of Five Hundred Dollars (\$500.00) by virtue of the second cause of action herein, and

3. In favor of plaintiffs for their costs herein incurred and expended, and

4. For such other and further relief as to the court seems just and proper in the premises.

[Signed] EDGAR B. HERVEY

Attorney for Plaintiffs [141]

State of California

County of San Diego—ss

Edgar B. Hervey, being first duly sworn, deposes and says: That he is an attorney at law admitted to practice before all courts of the State of California and has his office in San Diego, San Diego County, California, and is the attorney for the plaintiffs in the above entitled action; that plaintiff James Richard Osborne is unable to make the verification because he is absent from said county, and for that reason affiant makes this verification

on plaintiff's behalf; that he has read the foregoing complaint and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

[Signed] EDGAR B. HERVEY

Subscribed and sworn to before me this 22nd day of July, 1946

[Signed] DONA RICHARDS

Notary Public [142]

### EXHIBIT D

In the Superior Court of the State of California,  
in and for the County of San Diego.

No. 134918

Michael Lee, a minor, and Patricia Lee, a minor, by Mildred E. Taylor, their Guardian Ad Litem, Plaintiffs, vs. George White, et al., Defendants.

### ANSWER OF DEFENDANT GEORGE WHITE

Comes now the defendant George White and appearing for himself only and by way of answer to plaintiffs' complaint on file herein, admits, denies and alleges as follows:

#### I.

Answering Paragraph IV of plaintiffs' complaint this defendant has not knowledge, information or belief sufficient to enable him to answer the allegations in Paragraph IV contained and basing his answer on that ground denies generally and specifically, each and every, all and singular, the allegations in said Paragraph IV, except

that this defendant denies specifically that at said time and place, or elsewhere, or at all, this answering defendant negligently drove and operated, or negligently drove or operated, a certain automobile upon and along, or upon or [143] along, the said public highway, thereby causing the same to and did, or thereby causing the same to or did, then and there, or then or there, as a result thereof, or otherwise, collide with and run into, or collide with or run into, the said said Claude McLester Lee. Denies that as a direct and proximate result of the foregoing and the aforesaid negligence of the defendant George White, or that as a direct or proximate result of the foregoing or the aforesaid negligence, or any negligence whatsoever of the defendant George White, the said Claude McLester Lee sustained injuries which directly and proximately caused and resulted in his death on the said day, or that the said Claude McLester Lee sustained injuries which directly or proximately caused or resulted in his death on the said day, or at any other time, or at all.

## II.

Answering Paragraph V of plaintiffs' complaint said defendant does not have sufficient knowledge, information or belief to enable him to answer and basing his answer upon that ground denies each and every and all and singular the allegations contained in said paragraph.

## III.

Answering the allegations in Paragraph VI this answering defendant denies that by reason of any acts whatsoever of this answering defendant in the particulars in plaintiffs' complaint set out, or otherwise, or at all, the plaintiffs have been deprived of the services, support,

society, comfort, protection, guidance and education, or that the plaintiffs have been deprived of the services or support or society or comfort or protection or guidance or education, of or by their said father to their great loss and damage, or to their great loss or damage, or otherwise, or at all, of the said plaintiffs in the sum of Fifty Thousand Dollars (\$50,000.00) or any other sum whatsoever. [144] Denies that said damages, or any other damages whatsoever, have been sustained and suffered, or sustained or suffered, by them as a direct and proximate result, or direct or proximate result, of any acts whatsoever of this answering defendant.

Further Answering Plaintiffs' Said Complaint and for a Separate and First Special Defense Thereto, This Answering Defendant Alleges:

I.

That if the plaintiffs sustained damages in the particulars in their complaint set out, or otherwise, that the same occurred proximately and directly through and by reason of the negligence of the decedent in failing to exercise due or any care or caution for his own safety.

Wherefore, defendant prays that the plaintiffs take nothing by their said action and that defendant have and recover his costs of suit herein expended.

THOMAS P. MENZIES and  
HAROLD L. WATT

By .....

Attorneys for Defendant George White

Case No. 5729 O'C. Std. Accid. vs. Home Ind. Plf. Exhibit. Date 1/21/47. No. 13 in Evidence—3 pages—D-1, D-2, D-3. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [145]



EXHIBIT E

In the Superior Court of the State of California  
in and for the County of San Diego

No. 134918

Michael Lee, a minor, and Patricia Lee, a minor, by  
Mildred E. Taylor, their Guardian Ad Litem, Plaintiffs,  
vs. George White, et al., Defendants.

ANSWER OF DEFENDANT GEORGE WHITE

Comes now the defendant George White and answering the complaint on file herein for himself and not on behalf of his co-defendant, admits, denies and alleges as follows, to-wit:

I.

Alleges that this defendant has not information or belief sufficient to enable him to answer the allegations of paragraphs II, V and VI of the complaint on file herein and for want of such information and belief and basing his denial on that ground denies each and all of the allegations of said paragraphs, except that this defendant admits that Claude McLester Lee was at the time of his death an adult over the age of twenty-one (21) years.

II.

Answering paragraph III of the complaint on file herein this defendant alleges that the automobile mentioned in said paragraph was at the time of said accident owned by the [146] Northlumberland Mining Company, a corporation, and at the time and place of the accident described in the complaint this defendant was driving said automobile by and with the consent of said corporation.

## III.

This defendant denies generally and specifically each and all of the allegations in paragraph IV of the complaint on file herein, except this defendant admits that the automobile described in said paragraph, and while being driven by this defendant, did at or about the time and place described in said paragraph collide with Claude McLester Lee and that as a result of said collision said Claude McLester Lee sustained injuries which directly and proximately resulted in his death.

## IV.

This defendant denies that the plaintiffs, or either of them, have been damaged in any sum whatsoever.

And for a Further, Separate and Second Defense, This Defendant Alleges:

## I.

That if the plaintiffs sustained damages in the particulars in their complaint set out, or otherwise, that the same occurred proximately and directly through and by reason of the negligence of the decedent in failing to exercise due or any care or caution for his own safety.

Wherefore, this defendant prays that the plaintiffs take nothing by their said action and that this defendant have and recover his costs of suit herein expended.

THOMAS P. MENZIES and  
HAROLD L. WATT

By [Signed] Thomas P. Menzies  
Attorneys for Defendant George White [147]

State of California

County of San Diego.—ss

George White, being first duly sworn, deposes and says:

That he is one of the defendants in the above entitled action; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

[Signed] GEORGE WHITE

Subscribed and sworn to before me this 23rd day of August, 1946.

[Signed] GAYLE H. DAVIS

Notary Public in and for said County and State [148]

### EXHIBIT F

In the Superior Court of the State of California,  
in and for the County of San Diego.

No. 134918

Michael Lee, a minor, and Patricia Lee, a minor, by Mildred E. Taylor, their Guardian ad Litem, Plaintiffs, vs. George White, John Doe and Doe Corporation, a corporation, Defendants.

### COMPLAINT FOR WRONGFUL DEATH

Come now the plaintiffs above-named and for cause of action against the defendants above-named allege:

#### I.

That Michael Lee is a minor of the age of nine years and that Patricia Lee is a minor of the age of eleven

years; that by an order of the above entitled court duly made and entered on the 6th day of August, 1946, Mildred E. Taylor was duly appointed guardian ad litem of the said minors in the above entitled cause; that such order has not been revoked and is in full force and effect, and that by virtue thereof said Mildred E. Taylor is now the duly appointed, qualified and acting guardian ad litem of the said minors.

## II.

That the plaintiffs are ignorant of the true names of the defendants John Doe and Doe Corporation, a corporation, and for [149] that reason the said defendants are sued herein under the said names as fictitious names, and plaintiffs pray that when the true names of these defendants are ascertained, they may be inserted herein and in all subsequent proceedings in this action and that the said action may then proceed against them under their true names.

## III.

That at all times herein mentioned the defendants, John Doe and Doe Corporation, a corporation, were the owners of the automobile hereinafter mentioned and that at all times herein mentioned George White was driving the said automobile by and with the consent and permission of the said defendants, John Doe and Doe Corporation, a corporation.

## IV.

That on or about the 20th day of July, 1946, at or about the hour of 10:30 o'clock P. M. on said day, Claude McLester Lee was walking upon and along a certain public highway known as United States Highway No. 101

in the County of San Diego, State of California, at or about a point on said highway near the town of Ocean-side in said County; that at said time and place the defendant, George White, negligently drove and operated a certain automobile upon and along the said public highway, thereby causing the same to, and it did then and there as a result thereof, collide with and run into the said Claude McLester Lee; that as a direct and proximate result of the foregoing and the aforesaid negligence of the defendant, George White, the said Claude McLester Lee sustained injuries which directly and proximately caused and resulted in his death on the said day.

## V.

That the said Claude McLester Lee was an adult over the age of twenty-one years at the time of his said death; that plaintiffs, Michael Lee and Patricia Lee, are the surviving son and [150] daughter of the said Claude McLester Lee; that said Claude McLester Lee left surviving him at the time of his death his said minor children and his wife, Leona Ann Osborne Lee; that the said wife, Leona Ann Osborne Lee, died in the County of San Diego on July 21, 1946; that said Leona Ann Osborne did not during her lifetime file or initiate any action against the defendants herein for damages for the aforesaid death of said Claude McLester Lee; that the plaintiffs herein are the sole and only heirs at law of Claude McLester Lee, deceased.

## VI.

That by reason of the aforesaid death of the said Claude McLester Lee, the plaintiffs have been deprived of the services, support, society, comfort, protection, guidance and education of and by their said father to the

great loss and damage of the said plaintiffs in the sum of \$50,000, which damages have been sustained and suffered by them, all as a direct and proximate result of the aforesaid negligence of the defendant, George White.

Wherefore, plaintiffs pray judgment against the defendants and each thereof in the sum of \$50,000, together with costs of suit incurred herein, and for such other and further relief as may be meet and proper in the premises.

WILLIAM GUTHRIE  
JOHN B. LONERGAN and  
DONALD W. JORDAN

Attorneys for Plaintiffs

By [Signed] John B. Lonergan [151]

State of California,  
County of San Bernardino.—ss.

Mildred E. Taylor, being first duly sworn, deposes and says:

That she is the duly appointed, qualified and acting guardian ad litem herein of the plaintiffs; that she makes this verification for and on their behalf; that she has read the foregoing complaint and knows the contents thereof and the same is true of her own knowledge.

[Signed] MILDRED E. TAYLOR

Subscribed and sworn to before me this ..... day of August, 1946.

[Notarial Seal]

[Signed] ORA R. WILLEFORD

Notary Public in and for said County and State. [152]

EXHIBIT G

Law Office of  
THOMAS P. MENZIES

548 South Spring Street

Los Angeles (13)

August 15 1946.

Mr. George White,  
Beverly-Wilshire Hotel,  
Room 449,  
9514 Wilshire Boulevard,  
Beverly Hills, California.

Dear Mr. White:

Please find enclosed herewith two original answers, one in Action No. 134630, entitled Fitzgerald vs. White, the other in Action 134918, entitled Lee vs. White, both of which are now pending in the Superior Court of this state, in and for the County of San Diego.

You will note that both of these answers are prepared in accordance with the sworn statement that you gave to me as attorney for the carrier of the Lincoln Zephyr Sedan owned by the Northumberland Mining Company.

Please read these answers over carefully and make sure that you understand the full import of their contents. If there is any doubt in your mind as to any of the statements that are contained in these answers you may get in touch with me, or if you choose to submit them to your

own attorney before signing them you may do so. Both of these answers will have to be subscribed and sworn to by you before a Notary Public or other officer authorized to administer an oath in this state.

I have secured an extension of time in Action No. 134918 in which to file your answer. This time will expire on Monday, August 26th. The time for answer in Action No. 134630 expires on August 22, 1946.

Will you therefore please have both of these answers returned to my office not later than 10:00 o'clock A. M., August 21st.

No doubt you will recall that on July 31st you informed Mr. Clifton and the writer that you would be able to furnish us with the name and address of a young lady who had seen the damage to the left [153] fender of the Lincoln Zephyr Sedan that you borrowed from the Northumberland Mining Company. Would you please be good enough to furnish me by return mail

[end of page 1 of letter]

2.

Mr. Menzies to Mr. White August 15 1946.  
with that young lady's name and address in order that we may secure a statement from her.

Thanking you for your prompt attention to this matter,

Yours truly,

[Signed] THOMAS P. MENZIES

TPM—K

Enclosures [154]



EXHIBIT H

Law Office of  
THOMAS P. MENZIES  
548 South Spring Street  
Los Angeles (13)  
August 19 1946

Mr. John T. Holt,  
Attorney at Law,  
San Diego Trust & Savings Building,  
San Diego, California.

In Re: Fitzgerald vs. White  
Action No. 134630.  
Lee vs. White  
Action No. 134918.

Dear Mr. Holt:

Confirming our long distance telephone conversation of even date in regard to the above captioned matters, please find enclosed herewith a copy of the complaint in each case.

In the first numbered case, as you know, we filed a motion for change of venue from San Diego County to Los Angeles County, which motion was heard on the 12th of August and denied. Our demurrer was overruled and we were given until the 22nd in which to file our answer.

In the second action (Lee vs. White) we secured an extension of time from the attorneys for the plaintiffs and the answer in that case is due on August 26th.

I am also enclosing herewith a substitution of attorneys and I would suggest that you secure an extension of time in each of these cases in order to permit Mr.

White to turn the defense of both of these actions over to the Automobile Club of Southern California and the Standard Accident Company of Detroit.

As you know, I delivered to Mr. White answers in both of these cases which were prepared in accordance with his sworn statement given to us immediately after the accident when all of the facts were fresh in his mind. For your information this statement was repeated to us on two different occasions and there was no material change in [155] its repetition. In view of Mr. White's inconsistent statements in connection with this matter and as you say he told the Automobile Club the truth in regard to the facts and circumstances surrounding  
[end of page 1 of letter]

2.

Mr. Menzies to Mr. Holt.

August 19 1946.

In Re: Fitzgerald vs. White—No. 134630

Lee vs. White —No. 134918.

the accident, in my opinion, he should have no difficulty in convincing them that they should take over and defend these two cases.

For your information I am returning to Mr. White both his Inter-Insurance Exchange Policy of the Automobile Club and the Standard Accident Policy and am enclosing herewith a copy of the letter of transmittal which I am this day forwarding to Mr. White.

With kindest personal regards,

Yours truly,

[Signed] THOMAS P. MENZIES

TPM—K

Enclosures

CC—Mr. White [156]

EXHIBIT I

Law Office of  
THOMAS P. MENZIES  
548 South Spring Street  
Los Angeles

[Via Air Mail]

August 19 1946.

Mr. George White,  
Grant Hotel,  
San Diego, California.

Dear Sir:

I was today advised by your attorney, Mr. John T. Holt of San Diego, that it was not your wish to execute the answers which we had prepared based on your previous statements to the Company.

Copy of a letter which I am today addressing to Mr. Holt is enclosed herewith and which further sets out the position of The Home Indemnity Company in view of this development.

We return herewith Standard Accident Insurance Company Policy No. J 427867 and Inter-Insurance Exchange of the Automobile Club of Southern California Policy

No. 447540, both issued in your favor which you left at the office the other day.

As indicated in the letter to Mr. Holt we have consented to a substitution of attorneys in both cases in order that you may be represented by someone who will conduct the defense in accordance with your views.

For your further information you will note in the letter to Mr. Holt the date upon which appearances are due in both of the cases—one being due on the 22nd of this month and the other on the 26th. It is therefore imperative that you give this matter your immediate attention.

Very truly yours,

[Signed] THOMAS P. MENZIES

TPM—K

Enclosures

Registered—Return

Receipt Requested

CC—Mr. Holt [157]

EXHIBIT J

JOHN T. HOLT

Attorney at Law

Suite 1114 San Diego Trust & Savings Building

San Diego, California

Phone Main 8008

August 23rd, 1946.

Thomas P. Menzies,  
Attorney at Law,  
1014 Fidelity Building,  
548 South Spring Street,  
Los Angeles 13, California.

Dear Mr. Menzies:

Please find enclosed truthful answers verified by George White in the Fitzgerald vs George White case and Michael Lee et al., vs George White case. Mr. White has always cooperated and has been willing to do so. As you will remember, he has demanded of you on numerous occasions that you present to him the first statement you took from him to make corrections. You at all times have refused to do so. As you remember, he told you within twelve hours after the first statement that he had made to you that he remembered falling asleep and having awakened while driving the car and that the accident could have happened then. If you will remember several days after this and a very short time after the accident itself, you and I talked by telephone and I asked

you to remember the conversation, which I am sure you do, at which time I reiterated over and over again that George White had stated to me and wanted it again relayed to you that he had fallen asleep at or near the scene of the accident and that he may have hit the people at that time without his knowledge. I merely wish to refresh your recollection about this matter, because I have offered myself as a witness in this regard.

Mr. White makes demand upon you to defend the above referred to cases. It is our understanding that it is the duty of your Company to defend Mr. White and the other defendant in the cases, and Mr. White expects you to do so.

Very truly yours,

[Signed] JOHN T. HOLT

JTH:hs

encls [158]

Case No. .... vs. .... Plf. Exhibit. Date 1/20/47. No. 8 in Evidence. Letter 8/23/46 and answer No. 18 on p. 4 of Answer to Plf. for Adm. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

Received copy of the within Request for Admissions this 23 day of December, 1946. Thomas P. Menzies and Harold L. Watt, by Thomas P. Menzies, Attorneys for Defendant, Home Indemnity Company of New York.

[Endorsed]: Filed Dec. 23, 1946. [159]

[Title of District Court and Cause]

ANSWER OF HOME INDEMNITY COMPANY  
OF NEW YORK TO REQUEST OF PLAINTIFF  
FOR ADMISSIONS

To the Plaintiff, Standard Accident Insurance Company  
of Detroit, a Corporation, and

To Messrs. Nourse & Jones, Its Attorneys:

Comes now defendant Home Indemnity Company of New York, a corporation, and in answer to request for admissions heretofore served and filed by plaintiff, Standard Accident Insurance Company of Detroit, a corporation, makes answer as follows:

1. To Request No. 1, admits that Exhibit "A" attached to said request is a full, true and correct copy of the answer referred to in said request.

2. To Request No. 2, admits that said defendant George White refused to verify said answer referred to in [160] said interrogatory, but alleges that he did not designate the specific grounds upon which he based said refusal.

3. To Request No. 3, admits that the instrument marked Exhibit "B" is a full, true and correct copy of the answer referred to in said interrogatory.

4. To Request No. 4, this defendant states that the answer of which said Exhibit "B" is a copy, was delivered, presumably on behalf of said George White, to Thomas P. Menzies, Esq., an attorney employed by defendant Home Indemnity Company of New York to defend said action.

5. To Request No. 5, this defendant states that said Thomas P. Menzies, Esq., did cause said answer, of which Exhibit "B" is a copy, to be filed in the action in which it is entitled.

6. To Request No. 6, admits that the instrument marked Exhibit "C" is a full, true and correct copy of the complaint referred to in said request.

7. To Request No. 7, this defendant admits that the instrument referred to therein, marked Exhibit "B", is a full, true and correct copy (with the exception of the jurat) of the answer therein referred to.

8. To Request No. 8, admits that said George White refused to answer said interrogatory, but alleges that he did not designate the specific grounds upon which he based said refusal.

9. To Request No. 9, admits that the instrument referred to in said interrogatory and answer as Exhibit "E", is a full, true and correct copy of the answer therein referred to. [161]

10. To Request No. 10, admits that said answer, of which Exhibit "E" is a copy, was delivered on behalf of defendant George White to Thomas P. Menzies, an attorney employed by defendant Home Indemnity Company of New York, to defend said action.

Case No. .... Plf. Exhibit. No. 6 in Evidence.  
Ans. 5, 8, 9 and 10. Clerk, U. S. District Court, Sou.  
Dist. of Calif. ...., Deputy Clerk.



11. To Request No. 11, admits that Thomas P. Menzies caused said answer, of which Exhibit "E" is a copy, to be filed in the action in which it is entitled.

12. To Request No. 12, admits that the instrument annexed thereto, marked Exhibit "F", is a full, true and correct copy of the complaint referred to in said interrogatory.

13. To Request No. 13, admits the facts in said request set out.

14. To Request No. 14, defendant states that at the time of requesting defendant George White to verify the answers, of which Exhibits "A" and "B" are copies, the defendant Home Indemnity Company of New York, through its attorney, Thomas P. Menzies, Esq., knew that the plea of guilty referred to in Request No. 13, had been entered by defendant George White.

15. To Request No. 15, admits that the letter annexed thereto, marked Exhibit "G", is a full, true and correct copy of a letter written by Thomas P. Menzies to defendant George White on August 15, 1946.

16. To Request No. 16, admits that the copy of the letter annexed thereto, marked Exhibit "H", is a full, true and correct copy of a letter written by Thomas P. Menzies to John T. Holt under date of August 19, 1946.

17. To Request No. 17, admits that the copy of a letter annexed thereto, marked Exhibit "I", is a full, true [162] and correct copy of a letter written by Thomas P. Menzies to defendant George White under date of August 19, 1946.

18. To Request No. 18, admits that the copy of a letter annexed thereto, marked Exhibit "J", is a full, true

and correct copy of a letter dated August 23, 1946, written by John T. Holt to Thomas P. Menzies. [Written in margin]: part of ex. 8.

19. To Request No. 19, this defendant states that a reply was made to the letter of John T. Holt annexed thereto, marked Exhibit "J", and that reply thereto by Thomas P. Menzies on behalf of defendant Home Indemnity Company of New York, dated August 26, 1946, is annexed hereto, marked Exhibit "A".

20. To Request No. 20, admits that at all times from July 20, 1946, to and including August 23, 1946, Thomas P. Menzies was acting as attorney for this defendant.

Case No. 5729 O'C, Civ. Plf. Exhibit. Date 1/20/47. No. 5 in Evidence. Ans. No. 20. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

21. To Request No. 21, admits that in writing the letters, copies of which are annexed thereto and marked Exhibits "G", "H" and "I", Thomas P. Menzies was acting in behalf of this defendant.

22. To Request No. 22, this defendant states that it does not know and cannot truthfully state whether or not John T. Holt was, on the 23rd day of August, 1946, attorney for defendant George White, and does not know and cannot truthfully state whether as such attorney, or on behalf of George White, wrote the letter marked Exhibit "J" referred to in said Request No. 22, and this defendant states in this connection that on August 20, 1946, and again on August 27, 1946, its attorney, Thomas P. Menzies, received a telegram from John T. Holt, stating in part, "I do not and will [163] not represent Mr. White in the civil cases," and "This

is to put you on notice that I am not representing Mr. White in the civil cases.”

23. To Request No. 23, this defendant denies that the statement in the letter, a copy of which is annexed thereto, marked Exhibit “J”, “As you will remember, he has demanded of you on numerous occasions that you present to him the first statement you took from him to make corrections,” is a true statement of the alleged facts related therein. Denies that George White demanded on numerous occasions, or on any occasions, that he be presented with the first statement taken from him for the purpose of making corrections, or any other purpose, or at all.

24. To Request No. 24, denies that the statement in the letter (said Exhibit “J”) that “he told you within twelve hours after the first statement that he had made to you that he remembered falling asleep and having awakened while driving the car and that the accident could have happened then,” is a true statement of the statements made to this defendant, or its attorney, by George White and/or of the time of the making of said statements. Denies that defendant George White told this defendant within twelve hours after the first statement that he remembered falling asleep and having awakened while driving the car and that the accident could have happened then.

25. To Request No. 25, defendant admits that on or about July 29, 1946, said John T. Holt, in a telephone conversation with Thomas P. Menzies, attorney for de-

fendant Home Indemnity Company, made the statements referred to in said request; that none of this defendant's [164] agents, servants or employees were present at any conversation between John T. Holt and the defendant George White, and this defendant has no knowledge as to what, if anything, transpired between George White and John T. Holt.

Case No. 5729 O'C. Plf. Exhibit. Date 1/20/47. No. 10 in Evidence. Ans. 25. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

26. To Request No. 26, this defendant admits the statements in said request contained.

Case No. 5729 O'C. Plf. Exhibit. Date 1/20/47. No. 11 in Evidence. Ans. 26. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

Dated this 2nd day of January, 1947.

THE HOME INDEMNITY COMPANY OF  
NEW YORK, a Corporation,

By L. E. Clifton

Claims Manager for Southern California

THOMAS P. MENZIES and  
HAROLD L. WATT

By Thomas P. Menzies

Attorneys for Defendant The Home Indemnity  
Company of New York, a Corporation [165]

[Verified] [166]

EXHIBIT "A"

Law Offices  
THOMAS P. MENZIES  
548 South Spring Street  
Los Angeles

Mr. John T. Holt,  
Attorney at Law,  
Suite 1114 San Diego Trust & Savings Building,  
San Diego 1, California.

Dear Mr. Holt:

This will acknowledge receipt of your letter of August 23rd, together with the enclosures.

I am now returning herewith the original answer in Lee against White, the original answer in Fitzgerald against White, and am retaining a copy for my files.

Please be advised that the answer in Fitzgerald against White was due on the 22nd of August.

I take it from your letter that you are now representing Mr. White in the above mentioned civil matters.

Case No. .... Plf. Exhibit. Date 1/20/47. No. 9 in Evidence. Letter this par. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

I gather from your letter that your client has made inconsistent statements to you as well as to us and in view of all the circumstances surrounding this matter, the Company denies liability in both of these cases.

Very truly yours,  
(Signed) THOMAS P. MENZIES

TPM—K

Enclosures [167]

[Affidavit of Service by Mail]

[Endorsed]: Filed Jan. 3, 1947. [169]

[Title of District Court and Cause]

### AMENDMENT TO COMPLAINT

Comes now plaintiff, Standard Accident Insurance Company of Detroit, a corporation, and, by leave of court first had, by way of amendment to its complaint on file herein and particularly to the allegations of paragraph XVII of said complaint, does allege:

#### XVII.

That out of and by reason of the facts, contracts and transactions hereinbefore alleged and described, an actual controversy has arisen by and between plaintiff and defendant, Home Indemnity Company of New York, the plaintiff and defendant George White, and defendants Home Indemnity Company of New York and George White, as to the rights and duties of the plaintiff and defendant, Home Indemnity Company of New York, concerning their respective obligations to defend, on behalf [170] of defendant George White, said action No. 134918 and said action No. 134630, and in regard to the respective liabilities of the plaintiff and defendant, Home Indemnity Company of New York, to pay any judgments that may be rendered in said actions, or either of them, against the defendant George White.

That this plaintiff is informed and believes, and upon such information and belief alleges the fact to be, that the defendant, Home Indemnity Company of New York, contends that defendant George White, in reporting to it the accident hereinbefore described, denied that the Lincoln Zephyr automobile driven by him as aforesaid had collided with said Claude McLester Lee or said Leana Mae Osborne Lee, but that he thereafter admitted that said automobile had struck said persons and refused to verify answers to the complaints in said actions No.

134918 and No. 134630 submitted to him by the said counsel employed by Home Indemnity Company of New York, as aforesaid, and by which said answers said defendant, George White, would under oath have denied that the automobile driven by him collided with said persons; and that said Home Indemnity Company of New York contends that by reason of the facts last hereinbefore alleged said George White breached the conditions of the policy of insurance issued by it, as aforesaid, and that by reason of such breach it has been excused from the performance as to George White of its obligations under its policy of insurance issued by it as aforesaid, and is not obligated to defend said actions, or either of them, or to pay any judgment or judgments that may be rendered in said actions against said George White; that said Home Indemnity Company of New York further contends that if its policy is in force and effect and it is obligated thereunder to the defendant George White, that its policy and the policy issued by this plaintiff, as aforesaid, constitute concurrent insurance, and that it and this plaintiff are equally [171] obligated to pay the expense of the defense of said actions against said George White, and are each obligated to pay that portion of any judgments rendered in said actions No. 134918 and No. 134630 against said George White which the amount of the policy issued by them, respectively, bears to the total amount of the effective insurance under said policies.

That plaintiff is informed and believes, and upon such information and belief alleges, that the defendant, George White, contends that he has fully complied with all of the terms and conditions of said policy of insurance issued by defendant, Home Indemnity Company of New York, as aforesaid, and has not breached any of the terms or conditions thereof, and that said policy constitutes pri-

mary insurance against the claims of the plaintiffs in said actions No. 134918 and No. 134630, and that the defendant, Home Indemnity Company of New York, is obligated to defend said actions on his behalf and pay any judgments rendered against him therein up to but not exceeding the limits of liability set forth in said policy; but further contends that if he did breach said policy, said breach was unsubstantial and did not in anywise prejudice the defendant, Home Indemnity Company of New York, and further contends that if he did breach said policy and that by reason of said breach Home Indemnity Company of New York had been so excused from its obligations to him under said policy, that then this plaintiff is obligated to defend said actions on his behalf and to pay any judgments rendered against him in said actions No. 134918 and No. 134630, not exceeding the limits of liability of the policy issued by this plaintiff.

That this plaintiff contends that the policy issued by Home Indemnity Company of New York is in full force and effect and is primary coverage, and that said defendant, Home Indemnity Company of New York, is obligated to undertake and at its own expense [172] pay for the investigation of the accident hereinbefore described and the defense of the said actions against George White, and pay any judgments that may be rendered against George White until its limits of liability hereinbefore described have been exhausted, and that the policy of this plaintiff constitutes excess insurance only, and that this plaintiff is not obligated to defend said actions or to pay any judgments that may be rendered therein, except so much of said judgments as may be in excess of the limits of liability of the policy issued by defendant Home Indemnity Company of New York. This plaintiff further



contends that if defendant, George White, did after the occurrence of the accident hereinbefore described breach the terms of the policy issued by the defendant, Home Indemnity Company of New York, as aforesaid, on his part to be performed, and did thereby release and excuse Home Indemnity Company of New York from its obligations under said policy, that then defendant, George White, is obligated to pay the expense of the defense of said actions and to pay any judgments rendered against him therein up to, but not beyond, the amount which, except for said breach of said policy, Home Indemnity Company of New York would have been obligated to pay, and that this plaintiff is not obligated to defend said actions or to pay any portion of said judgments, except so much thereof (not exceeding the limits of the policy issued by it) as shall be in excess of \$100,000.00 as to any one of the plaintiffs, and \$300,000.00 for all of the plaintiffs in said actions No. 134918 and No. 134630.

This plaintiff further contends that if George White failed to cooperate with the defendant, Home Indemnity Company of New York, and did thereby breach the terms and conditions of the policy issued by defendant, Home Indemnity Company of New York, he likewise failed to cooperate with this plaintiff under and [173] in accordance with the terms of its policy, and that this plaintiff has, by reason of such failure of cooperation, been released from obligation under its policy.

NOURSE & JONES,

By Paul Nourse,

Attorneys for Plaintiff. [174]

Received copy of the within Amendment to Complaint  
this 20th day of January, 1947. ....  
Attorneys for Home Indemnity Company of New York.

[Endorsed]: Filed Jan. 20, 1947. [175]

## [PLAINTIFF'S EXHIBIT NO. 1]

In the Superior Court of the State of California  
in and for the County of San Diego  
No. 134630

James Carl Fitzgerald, a minor, by and through his  
Guardian ad litem, James Richard Osborne, and James  
Richard Osborne, Plaintiffs, vs. George White and North  
Lumberland Mining Company, Defendants.

## COMPLAINT

## FIRST CAUSE OF ACTION

Plaintiff James Carl Fitzgerald complains and alleges:

## I.

That plaintiff James Richard Osborne is the grand-  
father of plaintiff James Carl Fitzgerald; that said last  
mentioned plaintiff is a minor of the present age of eigh-  
teen months; that plaintiff James Richard Osborne is the  
duly appointed and acting guardian ad litem of said minor  
plaintiff herein.

## II.

That at all times herein mentioned, defendant North  
Lumberland Mining Company was the owner of a certain  
Lincoln Zephyr automobile driven, steered, operated and  
caused to be propelled with the full knowledge, consent  
and permission of said defendant company by defendant  
George White, and that the said defendant George White  
was at all times herein mentioned the servant, agent and  
employee of the said defendant company acting within  
the scope of his agency and authority as such servant,  
agent and employee.

### III.

That on July 20, 1946, in the County of San Diego, State of California, on U. S. Highway No. 101, a public highway, at and near [176] Solano Beach, defendant George White did carelessly, recklessly and negligently drive, steer, operate and cause to be propelled the said automobile into, upon and against one Leana Mae Osborne Lee, the mother of plaintiff James Carl Fitzgerald as a proximate result of which carelessness, recklessness and negligency the said Leana Mae Osborne Lee was caused to and did suffer her death.

### IV.

The said minor plaintiff James Carl Fitzgerald is the sole heir at law of the said Leana Mae Osborne Lee.

### V.

That by reason of the foregoing said minor plaintiff has been deprived of the society, services, comfort, support, *nuture*, counsel guidance, protection and ability in training, educating and rearing him, to his great loss and damage in the sum of Fifty Thousand Dollars (\$50,000.00).

## SECOND CAUSE OF ACTION

### I.

Plaintiff hereby refers to and adopts as part of this, the second cause of action, each and all of the allegations in paragraphs II and III of the first cause of action herein.

## II.

That plaintiff James Richard Osborne is the father of the said Leana Mae Osborne Lee, deceased; that the said Leana Mae Osborne Lee was at all times herein mentioned a minor of the age of 18 years; that by reason of the foregoing, this plaintiff has been obliged to incur and he has incurred liability and expense for the preparation of the body of the said Leana Mae Osborne Lee for burial and for her funeral and burial in an amount which said plaintiff is informed and believes and therefore alleges to be in the sum of Five Hundred Dollars (\$500.00) the reasonable value thereof.

Wherefore, plaintiffs pray judgment against the defendants, and each of them, as follows: [177]

1. In favor of plaintiff James Carl Fitzgerald in the sum of Fifty Thousand Dollars (\$50,000.00) by virtue of the first cause of action herein, and

2. In favor of the plaintiff James Richard Osborne in the sum of Five Hundred Dollars (\$500.00) by virtue of the second cause of action herein, and

3. In favor of plaintiffs for their costs herein incurred and expended, and

4. For such other and further relief as to the court seems just and proper in the premises.

EDGAR B. HERVEY (Signed)

Attorneys for Plaintiffs [178]

State of California

County of San Diego—ss

Edgar B. Hervey, being first duly sworn, deposes and says: That he is an attorney at law admitted to practice before all courts of the State of California and has his office in San Diego, San Diego County, California, and is the attorney for the plaintiffs in the above entitled action; that plaintiff James Richard Osborne is unable to make the verification because he is absent from said county, and for that reason affiant makes this verification on plaintiff's behalf; that he has read the foregoing complaint and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

EDGAR B. HERVEY (Signed)

Subscribed and sworn to before me this 22nd day of July, 1946.

DONA RICHARDS (Signed)

Notary Public [179]

Case No. 5729 O'C Civ. Std. Accid. vs. Home Indemnity. Plf. Exhibit. Date 1/20/47. No. 1 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [180]

## [PLAINTIFF'S EXHIBIT NO. 2]

In the Superior Court of the State of California

In and for the County of San Diego

No. 134630

James Carl Fitzgerald, a minor, by and through his Guardian at Litem, James Richard Osborne, and James Richard Osborne, Plaintiffs, vs. George White, and North Lumberland Mining Company, Defendants.

ANSWER OF DEFENDANT GEORGE WHITE

Comes now the defendant, George White, and answering the complaint on file herein for himself and not on behalf of his co-defendant, admits, denies and alleges as follows, to-wit:

I.

Alleges that this defendant has not information or belief sufficient to enable him to answer the allegations of paragraphs I, IV and V of the first alleged cause of action and paragraph II of the second alleged cause of action of the complaint on file herein, and for want of such information and belief and basing his denial on that ground denies each and all of the allegations of said paragraphs and the whole thereof.

II.

Denies that the plaintiff, James Carl Fitzgerald has been damaged in the sum of Fifty Thousand Dollars

(\$50,000.00), or in [181] any sum, or at all; denies that the plaintiff James Richard Osborne has been damaged in the sum of Five Hundred Dollars (\$500.00), or in any other sum, or at all.

### III.

Answering paragraph II of the first alleged cause of action set forth in the complaint on file herein, this defendant denies generally and specifically each and all of the allegations of said paragraph, except his defendant admits that the Lincoln Zephyr automobile described in said paragraph was at the time of the accident described in the complaint, owned by the defendant, North Lumberland Mining Company, and this defendant was at the time and place of the accident driving said automobile with the full knowledge and consent of said North Lumberland Mining Company.

### IV.

Answering paragraph III of the first alleged cause of action of the complaint on file herein this defendant denies generally and specifically each and all of the allegations of said paragraph, except that this defendant admits that the automobile driven by him did at or about the time and place described in the complaint, collide with Leane Mae Osborne Lee and that as a result of said collision Leana Mae Osborne Lee died, and except that this defendant has not information and belief sufficient to enable him to answer the allegations of said paragraph that said Leana

Mae Osborne Lee was the mother of the plaintiff, James Carl Fitzgerald, and for want of such information and belief and basing his denial on that ground denies that Leana Mae Osborne Lee was the mother of the plaintiff, James Carl Fitzgerald.

And for a Further and Separate Defense to Each of the First and Second Causes of Action Set Forth in the Complaint on File Herein This Defendant Alleges: [182]

I.

That if the plaintiffs sustained damages in the particulars in their complaint set out, or otherwise, that the same occurred proximately and directly through and by reason of the negligence of the decedent in failing to exercise due or any care or caution for her own safety.

Wherefore, defendant prays that the plaintiffs take nothing by their said action and that this defendant have and recover his costs of suit herein expended.

THOMAS F. MENZIES and  
HAROLD L. WATT,

By.....

Attorney for Defendant, George White.

Case No. 5729 O'C Civ. Std. Accid. vs. Home Indemnity. Plf. Exhibit. Date 1/20/47. No. 2 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [183]



[PLAINTIFF'S EXHIBIT NO. 3]

In the Superior Court of the State of California,  
in and for the County of San Diego.

No.....

Michael Lee, a minor, and Patricia Lee, a minor, by  
Mildred E. Taylor, their Guardian ad Litem, Plaintiffs,  
vs. George White, John Doe and Doe Corporation, a  
corporation, Defendants.

COMPLAINT FOR WRONGFUL DEATH

Come now the plaintiffs above-named and for cause of  
action against the defendants above-named allege:

I.

That Michael Lee is a minor of the age of nine years  
and that Patricia Lee is a minor of the age of eleven  
years; that by an order of the above entitled court duly  
made and entered on the 6th day of August, 1946, Mildred  
E. Taylor was duly appointed guardian ad litem of the  
said minors in the above entitled cause; that such order  
has not been revoked and is in full force and effect, and  
that by virtue thereof said Mildred E. Taylor is now the  
duly appointed, qualified and acting guardian ad litem  
of the said minors.

II.

That the plaintiffs are ignorant of the true names of  
the defendants John Doe and Doe Corporation, a corpora-  
tion, and for [184] that reason the said defendants are  
sued herein under the said names as fictitious names, and  
plaintiffs pray that when the true names of these de-  
fendants are ascertained, they may be inserted herein and

in all subsequent proceedings in this action and that the said action may then proceed against them under their true names.

### III.

That at all times herein mentioned the defendants, John Doe and Doe Corporation, a corporation, were the owners of the automobile hereinafter mentioned and that at all times herein mentioned George White was driving the said automobile by and with the consent and permission of the said defendants, John Doe and Doe Corporation, a corporation.

### IV.

That on or about the 20th day of July, 1946, at or about the hour of 10:30 o'clock P. M. on said day, Claude McLester Lee was walking upon and along a certain public highway known as United States Highway No. 101 in the County of San Diego, State of California, at or about a point on said highway near the town of Oceanside in said County; that at said time and place the defendant, George White, negligently drove and operated a certain automobile upon and along the said public highway, thereby causing the same to, and it did then and there as a result thereof, collide with and run into the said Claude McLester Lee; that as a direct and proximate result of the foregoing and the aforesaid negligence of the defendant, George White, the said Claude McLester Lee sustained injuries which directly and proximately caused and resulted in his death on the said day.

### V.

That the said Claude McLester Lee was an adult over the age of twenty-one years at the time of his said death:

that plaintiffs, Michael Lee and Patricia Lee, are the surviving son and [185] daughter of the said Claude McLester Lee; that said Claude McLester Lee left surviving him at the time of his death his said minor children and his wife, Leona Ann Osborne Lee; that the said wife, Leona Ann Osborne Lee, died in the County of San Diego on July 21, 1946; that said Leona Ann Osborne Lee did not during her lifetime file or initiate any action against the defendants herein for damages for the aforesaid death of said Claude McLester Lee; that the plaintiffs herein are the sole and only heirs at law of Claude McLester Lee, deceased.

## VI.

That by reason of the aforesaid death of the said Claude McLester Lee, the plaintiffs have been deprived of the services, support, society, comfort, protection, guidance and education of and by their said father to the great loss and damage of the said plaintiffs in the sum of \$50,000, which damages have been sustained and suffered by them, all as a direct and proximate result of the aforesaid negligence of the defendant, George White.

Wherefore, plaintiffs pray judgment against the defendants and each thereof in the sum of \$50,000, together with costs of suit incurred herein, and for such other and further relief as may be meet and proper in the premises.

WILLIAM GUTHRIE,  
JOHN B. LONERGAN and  
DONALD W. JORDAN,

Attorneys for Plaintiffs,

By John B. Lonergan. [186]

State of California,  
County of San Bernardino—ss.

Mildred E. Taylor, being first duly sworn, deposes and says:

That she is the duly appointed, qualified and acting guardian ad litem herein of the plaintiffs; that she makes this verification for and on their behalf; that she has read the foregoing complaint and knows the contents thereof and the same is true of her own knowledge.

MILDRED E. TAYLOR

Subscribed and sworn to before me this.....day of  
August, 1946.

(Notarial Seal)      ORA R. WILLEFORD,  
Notary Public in and for said County and State

Case No. 5729 O'C. Std. Accid. vs. Home Ind. Plf.  
Exhibit. Date 1/20/47. No. 3 in Evidence. Clerk, U. S.  
District Court, Sou. Dist of Calif. Cross, Deputy  
Clerk. [187]

[PLAINTIFF'S EXHIBIT NO. 4]

In the Superior Court of the State of California  
In and for the County of San Diego

No. 134918

Michael Lee, a minor, and Patricia Lee, a minor, by  
Mildred E. Taylor, their Guardian Ad Litem, Plaintiffs,  
vs. George White, et al., Defendants.

ANSWER OF DEFENDANT GEORGE WHITE

Comes now the defendant George White and answering the complaint on file herein for himself and not on behalf of his co-defendant, admits, denies and alleges as follows, to-wit:

I.

Alleges that this defendant has not information or belief sufficient to enable him to answer the allegations of paragraphs II, V and VI of the complaint on file herein and for want of such information and belief and basing his denial on that ground denies each and all of the allegations of said paragraphs, except that this defendant admits that Claude McLester Lee was at the time of his death an adult over the age of twenty-one (21) years.

II.

Answering paragraph III of the complaint on file herein this defendant alleges that the automobile mentioned in said paragraph was at the time of said accident owned by the [188] Northlumberland Mining Company, a corporation, and at the time and place of the accident described in the complaint this defendant was driving said automobile by and with the consent of said corporation.

## III.

This defendant denies generally and specifically each and all of the allegations in paragraph IV of the complaint on file herein, except this defendant admits that the automobile described in said paragraph, and while being driven by this defendant, did at or about the time and place described in said paragraph collide with Claude McLester Lee and that as a result of said collision said Claude McLester Lee sustained injuries which directly and proximately resulted in his death.

## IV.

This defendant denies that the plaintiffs, or either of them, have been damaged in any sum whatsoever.

And for a Further, Separate and Second Defense, This Defendant Alleges:

## I.

That if the plaintiffs sustained damages in the particulars in their complaint set out, or otherwise, that the same occurred proximately and directly through and by reason of the negligence of the decedent in failing to exercise due or any care or caution for his own safety.

Wherefore, this defendant prays that the plaintiffs take nothing by their said action and that this defendant have and recover his costs of suit herein expended.

THOMAS P. MENZIES and  
HAROLD L. WATT

By.....

Attorneys for Defendant George White

Case No. 5729 O'C. Std. Accid. vs. Home Ind. Plf.  
Exhibit. Date 1/20/47. No. 4 in Evidence. Clerk, U. S.  
District Court, Sou. Dist. of Calif. Cross, Deputy  
Clerk. [189]

[PLAINTIFF'S EXHIBIT NO. 14]

Law Office of  
THOMAS P. MENZIES  
548 South Spring Street  
Los Angeles (13)  
August 26 1946.

Mr. John T. Holt,  
Attorney at Law,  
Suite 1114 San Diego Trust & Savings Building,  
San Diego 1, California.

Dear Mr. Holt:

This will acknowledge receipt of your letter of August 23rd, together with the enclosures.

I am returning herewith the original answer in Lee against White, the original answer in Fitzgerald against White, and am retaining a copy for my files.

Please be advised that the answer in Fitzgerald against White was due on the 22nd of August.

I take it from your letter that you are now representing Mr. White in the above mentioned civil matters.

I gather from your letter that your client has made inconsistent statements to you as well as to us and in view of all the circumstances surrounding this matter, the Company denies liability in both of these cases.

Very truly yours,

Thomas P. Menzies

TPM—K

Enclosures [190]

Case No. 5729 O'C. Std. Accident vs. Home Ind. Plf. Exhibit. Date 1/21/47. No. 14 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [191]

[PLAINTIFF'S EXHIBIT NO. 15]

[WESTERN UNION TELEGRAM]

\* \* \* \* \*

Charge to the account of John T. Holt \$.....

DAY LETTER

August 27th, 1946.

Thomas P. Menzies,  
Attorney at Law,  
548 So. Spring St.,  
Los Angeles, California.

As I have told you and written you over and over I do not and will not represent Mr. White in the civil cases. He has not made inconsistent statements to me or to you. Your behaviour is shocking in the case and borders on the unethical.

John T. Holt, Attorney at Law,  
1114 San Diego Trust & Sav. Bldg.,  
San Diego, Calif.

Case No. 5729 O'C. Std. Accident vs. Home Ind. Plf.  
Exhibit. Date 1/21/47. No. 15 in Evidence. Clerk,  
U. S. District Court, Sou. Dist. of Calif. Cross, Deputy  
Clerk. [192]



[PLAINTIFF'S EXHIBIT NO. 16]

[WESTERN UNION TELEGRAM]

\* \* \* \* \*

Charge to the account of John T. Holt \$.....

DAY LETTER August 20th, 1946.

Thomas P. Menzies,  
548 So. Spring St.,  
Los Angeles, Calif.

As I told you I refuse to accept any responsibility in the Civil cases against George White. Mr. White is willing and has always been willing to execute truthful answers to the cases at your request. He states he has repeatedly told you that he fell asleep but that you persist in disregarding his statement. This is to put you on notice that I am not representing Mr. White in the Civil cases.

JOHN T. HOLT

Case No. 5729. Std. Accident vs. Home Ind. Plf. Exhibit. Date 1/21/47. No. 16 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [193]

## [PLAINTIFF'S EXHIBIT NO. 17]

Law Office of  
THOMAS P. MENZIES  
548 South Spring Street  
Los Angeles (13)  
August 14 1946.

Messrs. Guthrie, Lonergan and Jordan,  
Attorneys at Law,  
506 Andreson Building,  
San Bernardino, California.  
Attention: Mr. John B. Lonergan.

In Re: Michael Lee, a minor, etc., et al.,  
vs.

George White, et al.  
San Diego County Sup. Ct. No. 134918.

Gentlemen:

Confirming our telephone conversation of even date wherein you agreed to give me to and including the 26th day of August, 1946, within which to file an appearance on behalf of the defendant George White in the above captioned action, I appreciate very much your courtesy in this matter, and it may be that when Mr. White sees the pleadings in this case that he may desire to have counsel other than the writer in this action.

Very truly yours,

Thomas P. Menzies

TPM—K

Case No. 5729 O'C. Std. Accid. vs. Home Ind. Plf.  
Exhibit. Date 1/21/47. No. 17 in Evidence. Clerk,  
U. S. District Court, Sou. Dist. of Calif. Cross, Deputy  
Clerk. [194]

[PLAINTIFF'S EXHIBIT NO. 18]

Law Office of  
THOMAS P. MENZIES  
548 South Spring Street  
Los Angeles (13)  
August 15 1946.

Mr. George White,  
Beverly-Wilshire Hotel, Room 449,  
9514 Wilshire Boulevard,  
Beverly Hills, California.

Dear Mr. White:

Please find enclosed herewith two original answers, one in Action No. 134630, entitled Fitzgerald vs. White, the other in Action 134918, entitled Lee vs. White, both of which are now pending in the Superior Court of this state, in and for the County of San Diego.

You will note that both of these answers are prepared in accordance with the sworn statement that you gave to me as attorney for the carrier of the Lincoln Zephyr Sedan owned by the Northumberland Mining Company.

Please read these answers over carefully and make sure that you understand the full import of their contents. If there is any doubt in your mind as to any of the statements that are contained in these answers you may get in touch with me, or if you choose to submit them to your own attorney before signing them you may do so. Both

of these answers will have to be subscribed and sworn to by you before a Notary Public or other officer authorized to administer an oath in this state.

I have secured an extension of time in Action No. 134918 in which to file your answer. This time will expire on Monday, August 26th. The time for answer in Action No. 134630 expired on August 22, 1946.

Will you therefore please have both of these answers returned to my office not later than 10:00 o'clock A. M., August 21st.

No doubt you will recall that on July 31st you informed Mr. Clifton and the writer that you would be able to furnish us with the name and address of a young lady who had seen the damage to the left fender of the Lincoln Zephyr Sedan that you borrowed from the Northumberland Mining Company. Would you please be good enough to furnish me by return mail [195]

#2.

Mr. Menzies to Mr. White. August 15 1946.

with that young lady's name and address in order that we may secure a statement from her.

Thanking you for your prompt attention to this matter,

Yours truly,

Thomas P. Menzies

TPM—K

Enclosures [196]

Case No. 5729 O'C Civ. Standard Accident vs. Home Indemnity. Plf. Exhibit. Date 1/22/47. No. 18 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [197]

[PLAINTIFF'S EXHIBIT NO. 19]

Law Offices of

THOMAS P. MENZIES

548 South Spring Street

Los Angeles (13)

[VIA AIR MAIL]

August 19 1946.

Mr. George White,  
Grant Hotel,  
San Diego, California.

Dear Sir:

I was today advised by your attorney, Mr. John T. Holt of San Diego, that it was not your wish to execute the answers which we had prepared based on your previous statements to the Company.

Copy of a letter which I am today addressing to Mr. Holt is enclosed herewith and which further sets out the position of The Home Indemnity Company in view of this development.

We return herewith Standard Accident Insurance Company Policy No. J 427867 and Inter-Insurance Exchange of the Automobile Club of Southern California Policy No. 447540, both issued in your favor which you left at the office the other day.

As indicated in the letter to Mr. Holt we have consented to a substitution of attorneys in both cases in order that you may be represented by someone who will conduct the defense in accordance with your views.

For your further information you will note in the letter to Mr. Holt the date upon which appearances are due in both of the cases—one being due on the 22nd of this month and the other on the 26th. It is therefore imperative that you give this matter your immediate attention.

Very truly yours,

Thomas P. Menzies

TPM—K

Enclosures

Registered—Return

Receipt Requested

CC-Md. Holt [198]

Case No. 5729 O'C Civ. Std. Accident vs. Home Ind. Plf. Exhibit Date 1/22/47. No. 19 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [199]

[PLAINTIFF'S EXHIBIT NO. 20]

Law Office of  
THOMAS P. MENZIES  
548 South Spring Street  
Los Angeles (13)  
August 19 1946.

Mr. John T. Holt,  
Attorney at Law,  
San Diego Trust & Savings  
Building,  
San Diego, California.

In Re: Fitzgerald vs. White  
Action No. 134630.  
Lee vs. White  
Action No. 134918.

Dear Mr. Holt:

Confirming our long distance telephone conversation of even date in regard to the above captioned matters, please find enclosed herewith a copy of the complaint in each case.

In the first numbered case, as you know, we filed a motion for change of venue from San Diego County to Los Angeles County, which motion was heard on the 12th of August and denied. Our demurrer was overruled and we were given until the 22nd in which to file our answer.

In the second action (Lee vs. White) we secured an extension of time from the attorneys for the plaintiffs and the answer in that case is due on August 26th.

I am also enclosing herewith a substitution of attorneys and I would suggest that you secure an extension of time in each of these cases in order to permit Mr. White to turn the defense of both of these actions over to the Automobile Club of Southern California and the Standard Accident Company of Detroit.

As you know, I delivered to Mr. White answers in both of these cases which were prepared in accordance with his sworn statement given to us immediately after the accident when all of the facts were fresh in his mind. For your information this statement was repeated to us on two different occasions and there was no material change in its repetition. In view of Mr. White's inconsistent statements in connection with this matter and as you say he told the Automobile Club the truth in regard to the facts and circumstances surrounding [200]

#2.

Mr. Menzies to Mr. Holt.

August 19 1946.

In Re: Fitzgerald vs. White — No. 134630

Lee vs. White — No. 134918.

the accident, in my opinion, he should have no difficulty in convincing them that they should take over and defend these two cases.

For your information I am returning to Mr. White both his Inter-Insurance Exchange Policy of the Automobile Club and the Standard Accident Policy and am enclosing herewith a copy of the letter of transmittal which I am this day forwarding to Mr. White.

With kindest personal regards,

Yours truly,

Thomas P. Menzies

TPM—K

Enclosures

CC-Mr. White [201]

Case No. 5729 O'C Civ. Std. Accident vs. Home Indemnity. Plf. Exhibit. Date 1/22/47. No. 20 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [202]



[PLAINTIFF'S EXHIBIT NO. 21]

JOHN T. HOLT

Attorney at Law

Suite 1114 San Diego Trust & Savings Building

San Diego, California

Phone Main 8008

August 23rd, 1946.

Thomas P. Menzies,  
Attorney at Law,  
1014 Fidelity Building,  
548 South Spring Street,  
Los Angeles 13, California.

Dear Mr. Menzies:

Please find enclosed truthful answers verified by George White in the Fitzgerald vs George White case and Michael Lee et al., vs George White case. Mr. White has always cooperated and has been willing to do so. As you will remember, he has demanded of you on numerous occasions that you present to him the first statement you took from him to make corrections. You at all times have refused to do so. As you remember, he told you within twelve hours after the first statement that he had made to you that he remembered falling asleep and having awakened while driving the car and that the accident

could have happened then. If you will remember several days after this and a very short time after the accident itself, you and I talked by telephone and I asked you to remember the conversation, which I am sure you do, at which time I reiterated over and over again that George White had stated to me and wanted it again relayed to you that he had fallen asleep at or near the scene of the accident and that he may have hit the people at that time without his knowledge. I merely wish to refresh your recollection about this matter, because I have offered myself as a witness in this regard.

Mr. White makes demand upon you to defend the above referred to cases. It is our understanding that it is the duty of your Company to defend Mr. White and the other defendant in the cases, and Mr. White expects you to do so.

Very truly yours,

JOHN T. HOLT

JTH;hs

encls [203]

Case No. 5729 O'C Civ. Standard Accid vs. Home Ind. Plf. Exhibit. Date 1/22/47. No. 21 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross. Deputy Clerk. [204]

[PLAINTIFF'S EXHIBIT NO. 22]

C O P Y

Law Office of  
THOMAS P. MENZIES  
548 South Spring Street,  
Los Angeles (13)  
August 26, 1946.

Mr. John T. Holt,  
Attorney at Law,  
Suite 1114 San Diego Trust & Savings Building,  
San Diego 1, California.

Dear Mr. Holt:

This will acknowledge receipt of your letter of August 23rd, together with the enclosures.

I am returning herewith the original answer in Lee against White, the original answer in Fitzgerald against White, and am retaining a copy for my files.

Please be advised that the answer in Fitzgerald against White was due on the 22nd of August.

I take it from your letter that you are now representing Mr. White in the above mentioned civil matters.

I gather from your letter that your client has made inconsistent statements to you as well as to us and in view of all the circumstances surrounding this matter, the Company denies liability in both of these cases.

Very truly yours,

/s/ THOMAS P. MENZIES

TPM—K

Enclosures [205]

Case No. 5729 O'C. Std. Accident vs. Home Ind. Co.  
Plf. Exhibit. Date 1/22/47. No. 22 in Evidence.  
Clerk, U. S. District Court, Sou. Dist. of Calif. Cross,  
Deputy Clerk. [206]

## [PLAINTIFF'S EXHIBIT NO. 23]

August 5, 1946.

Statement of George White, age 52 address Beverly Wilshire Hotel, Beverly Hills Calif. Concerning accident that occurred on July 20, 1946, approx. ?, on highway 101 near Solana Beach Calif.

I was driving Mr. Walter Haggerty Lincoln Sedan. The car is registered in name of Northumberland Mining Co. Mr. Haggerty is an officer of the Company. The Lincoln Sedan is registered in State of Nevada. I had full permission to drive the car from Los Angeles to San Diego as my car was in the repair shop.

I left Los Angeles approx 6:30 PM on July 20, 1946 and drove at average rate of speed. At San Clemente Calif at a Cafe and had 2 cups of coffee.

(drive in)

X George White [207]

Page 2.

I was alone in the car. I had driven on considerable distance, when I must have dozed off to sleep for a moment. The next thing I remember my car was at almost a standstill on the highway, I looked around a moment without getting out of the car then put car in low gear and proceeded on to San Diego. I had entered the City of San Diego when Officers stopped me and took me to Police Station without telling me what I was

being taken in for except that there had been an accident and they were stopping all car.

Later I was booked for ~~man~~ hit & run and suspicion of Manslaughter.

Atty Thomas P. Menzies, 548 So Spring St and L. E. Clifton (Claim Adjuster) and representing the Home Indemnity Co. of New York, insurance carriers for the Northumberland Mining Co. My insurance with, Standard Accident is on a 1942 Packard Coupe Shaughnessy

X George White [208]

Case No. .... vs. .... Plf. Exhibit. Date 1/22/47. No. 23 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [209]

## [DEFENDANTS' EXHIBIT N]

### AGREEMENT OF NON-WAIVER AND RESERVATION OF RIGHTS.

It is Hereby Mutually Agree, by and between The Home Indemnity Company of New York, and George White, under their Policy No. CAU 6011452, that in the signing of this agreement, or the investigation or defending of any action at law or in equity arising out of an accident which is alleged to have occurred on or about the 20th day of July, 1946, in the County of San Diego,

near Solano Beach, and that in investigating any and all of the facts and circumstances surrounding said accident, and any and all claims of any and every nature whatsoever for personal injuries and property damage arising out of said accident, each party to this agreement specifically reserves unto themselves each and every right and defense which either may have pursuant to the terms and conditions of the above numbered policy of insurance; and that neither party to this agreement shall waive or invalidate any of the terms or conditions of said policy or policies of insurance, and shall not waive or invalidate any rights which either may have of any nature whatsoever, and that each party to this agreement specifically reserves each and every and all and singular rights and defenses which each may have by reason of the terms and conditions of said policy or policies of insurance above numbered herein.

Dated this 26th day of July, 1946, at Los Angeles, California.

THE HOME INDEMNITY  
COMPANY OF NEW YORK.

By L. E. Clifton

George White.

(George White)

Case No. 5729 O'C Civ. Std. Accident vs. Home Indemnity. Home Indemnity Exhibit No. N in Evidence. Dated 1/21/47. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [210]

[Title of District Court and Cause]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial in the District Court of the United States for the Southern District of California, Central Division, before the Honorable J. F. T. O'Connor, Judge of said court, at 2:00 o'clock, P. M., on the 20th day of January, 1947, Paul Nourse, Esq., appearing in behalf of plaintiff, Standard Accident Insurance Company of Detroit, Thomas P. Menzies, Esq., and Harold L. Watt, Esq., appearing in behalf of defendant, Home Indemnity Company of New York, Edgar A. Luce, Esq., appearing in behalf of defendant, George White, John B. Lonergan, Esq., appearing in behalf of defendants, James Carl Fitzgerald, James Richard Osborne, and Michael Lee and Patricia Lee, and evidence both oral and documentary having been introduced, and the cause having been submitted to the court for decision, the [211] court now makes the following Findings of Fact and Conclusions of Law:

### FINDINGS OF FACT

1. The court finds that the plaintiff is now, and was at the time of the commencement of this action, a resident and citizen of the State of Michigan, and that the defendant, Home Indemnity Company of New York, is now, and was at the time of the commencement of this action, a resident and citizen of the State of New York; that the defendants, George White, James Carl Fitzgerald, James Richard Osborne, Michael Lee and Patricia Lee, are now, and were at the time of the commence-

ment of this action, residents and citizens of the State of California. The court further finds that the amount involved in this action is in excess of \$3,000.00, exclusive of interest and costs of suit, and that by reason of the facts hereinbefore in this paragraph found this court has jurisdiction over the cause.

2. The court finds that on or about the 2nd day of December, 1945, defendant Home Indemnity Company of New York issued and executed a policy of liability insurance, by the terms of which it agreed to pay on behalf of Northumberland Mining Co., a corporation, Walter Haggerty, or any persons using the Lincoln automobile described in said policy of insurance with the consent of said Walter Haggerty or Northumberland Mining Co., the liability imposed upon them by law for damages, not exceeding \$100,000.00 for each person injured or killed in any one accident and \$300,000.00 for all persons injured or killed in any one accident, because of bodily injury, including death at any time resulting therefrom, caused by accident arising out of the ownership, maintenance or use of said Lincoln automobile, and that said policy of automobile liability insurance is and was in the words and figures set forth in the copy of said policy annexed to the answer of defendant, Home Indemnity [212] Company, herein and marked Exhibit A to said answer, and that said policy of insurance issued by defendant Home Indemnity Company was in full force and effect at all times from the 2nd day of December, 1945, to the 2nd day of December, 1946.

3. The court finds that on or about the 29th day of September, 1945, plaintiff, Standard Accident Insurance Company of Detroit, executed and delivered to defendant, George White, a policy of automobile liability insurance,



wherein and whereby it agreed to pay on behalf of George White or any person using the certain Packard automobile which is described in said policy of insurance with his consent, the liability imposed upon him by law for damages, not exceeding \$25,000.00 for each person injured or killed in one accident and not exceeding \$50,000.00 for all persons injured or killed in any one accident, because of bodily injuries, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the Packard automobile described in said policy; that by the terms of said policy of insurance plaintiff further agreed that if the Packard automobile described in said policy should be withdrawn from normal use because of its breakdown, repair or servicing, the insurance afforded by said policy with respect to said Packard automobile should apply as to any automobile not owned by said George White and which was used by him as a substitute for the Packard automobile described in said policy, but that such insurance should be excess insurance over and above the valid and collectible insurance available to said defendant, George White, under a policy of insurance issued in respect to the substituted automobile driven by him; that said policy of insurance issued by plaintiff is and was in words and figures as set forth in the copy of said policy which is annexed to the complaint on file herein and made Exhibit A to said complaint, and was in force and effect at all times from the 29th day of September, 1945, to the 29th day of September, 1946. [213]

4. The court finds that said policies of insurance issued by defendant, Home Indemnity Company of New York, and by plaintiff, each provided that it was issued

subject to the exclusions, conditions and other terms of the policy, and each contained conditions, among others, as follows:

“When an accident occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.”

“The insured shall cooperate with the company and, upon the company’s request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payments, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.”

5. The court finds that on the 20th day of July, 1946, the Packard automobile described in the policy of insurance issued by the plaintiff was withdrawn from normal use and was under repair, and that on said day and at the time of the accident hereinafter described defendant George White was using and driving the Lincoln automobile described in the said policy of insurance issued by defendant Home Indemnity Company of New York, with the consent of Walter Haggerty and said Northumberland Mining Co., who were the persons named as

insured in said policy, and that said George White was on the 20th day of July, 1946, and at all times since has been an assured under said policy of insurance issued by defendant Home Indemnity Company of New York. [214]

6. The court finds that on said 20th day of July, 1946, and while said George White was using and driving said Lincoln automobile as hereinbefore found, said Lincoln automobile ran into and collided with Claude McLester Lee and Leana Mae Osborne Lee, and that as result of the injuries sustained in said collision said Claude McLester Lee and Leana Mae Osborne Lee died.

7. The court finds that after the occurrence of said accident, on or about the 23rd day of July, 1946, George White reported said accident to defendant, Home Indemnity Company of New York, but reported that he had not been involved in any accident upon the 20th day of July, 1946, while driving the said Lincoln automobile; that after the 23rd day of July, 1946, and prior to the 31st day of July, 1946, said defendant George White further reported to said Home Indemnity Company of New York that he had fallen asleep while driving said Lincoln automobile on the 20th day of July, 1946, and that the accident in which the aforesaid persons were killed must have happened at that time, and that he, said George White, intended to enter a plea of guilty to a charge brought against him by the People of the State of California that he had failed to stop and render aid at the time of said accident; that thereafter and prior to the 14th day of August, 1946, George White, by and through his attorney, John T. Holt, Esq., did advise the defendant, Home Indemnity Company of New York, that

he could not deny that it was the Lincoln automobile driven by him as aforesaid which had struck and killed the said Claude McLester Lee and Leana Mae Osborne Lee, and again advised said defendant Home Indemnity Company of New York that he had fallen asleep and did not know of the occurrence of the accident, but because of the damage to said Lincoln automobile and other facts which were then known to defendant George White and defendant Home Indemnity Company, he believed that it was said Lincoln automobile driven by him which had been involved in said accident and caused the death of said persons. [215]

The court further finds that all of said reports made by defendant George White to defendant Home Indemnity Company were oral, but that defendant, Home Indemnity Company of New York, requested said oral reports and acted thereon and waived the making of any written report by the defendant George White.

8. The court finds that on or about the 22nd day of July, 1946, defendants, James Carl Fitzgerald and James Richard Osborne, commenced an action in the Superior Court of the State of California in and for the County of San Diego, numbered 134630, against the defendant, George White, and the Northumberland Mining Co., a corporation, named as an assured in the policy issued by defendant, Home Indemnity Company of New York, as aforesaid, wherein they alleged that they were the heirs-at-law of said Leana Mae Osborne Lee, and that the death of Leana Mae Osborne Lee was caused by the carelessness and negligence of defendant George White in the operation of said Lincoln automobile, and that by reason of the death of said Leana Mae Osborne Lee they had been damaged in the sum of \$50,500.00.

9. The court finds that on or about the 6th day of August, 1946, defendants, Michael Lee and Patricia Lee, did commence an action in the Superior Court of the State of California in and for the County of San Diego, numbered 134918, against defendant George White, wherein they alleged that they were the sole heirs-at-law of Claude McLester Lee, and that said Claude McLester Lee was killed by and through the negligence of defendant George White in the operation of said Lincoln automobile, and that by reason of the alleged wrongful death of said Claude McLester Lee they had been damaged in the sum of \$50,000.00.

10. The court finds that defendant, George White, tendered to defendant, Home Indemnity Company of New York, the defense of each of the said actions brought against him in the Superior Court of the State of California in and for the County of San Diego, hereinbefore described, and that defendant, Home Indemnity Company of [216] New York, did accept the defense of each of said actions in his behalf, and did employ an attorney, to wit, one Thomas P. Menzies, Esq., to defend each of said actions in behalf of defendant, George White, and that said Thomas P. Menzies, Esq., did accept said employment and did act in said actions in behalf of defendant George White.

11. The court finds that on or about the 15th day of August, 1946, defendant Home Indemnity Company of New York did cause to be prepared answers for verification by defendant George White, in each of the aforesaid actions in the state court, each of which answers did contain a denial that the Lincoln automobile driven by George White, as aforesaid, had collided with the

said Claude McLester Lee and Leana Mae Osborne Lee, and a denial that the death of said persons was the result of the collision with said Lincoln automobile, and that defendant Home Indemnity Company caused said answers to be presented to said George White and did request said George White to verify said answers, said answers being in the words and figures and form of Plaintiff's Exhibits 12 and 13 received in evidence herein.

12. The court finds that said George White refused to verify said answers tendered to him as hereinbefore found, but the court finds that said George White was justified in refusing to verify said answers, in that, the denials contained therein, that the Lincoln automobile driven by George White had collided with the said Claude McLester Lee and Leana Mae Osborne Lee and that their death had resulted from said collision, were untrue, and were then known by defendant White to be untrue, and were then known by defendant Home Indemnity Company to be untrue.

13. The court further finds that on or about the 23rd day of August, 1946, defendant George White did sign and verify and deliver to defendant, Home Indemnity Company of New York, answers in each of said actions brought in the Superior Court of the State of California in and for the County of San Diego, each of which said answers was substantially in the same form as that tendered to him by defendant [217] Home Indemnity Company for verification as aforesaid, except that by the answers so verified by George White he admitted that the automobile driven by him collided with the persons killed as aforesaid, and did not deny that their death was the result of said collision, said answers

being in words and figures and in the form of the copies thereof admitted into evidence herein and marked, respectively, Plaintiff's Exhibits 2 and 4.

14. The court finds that defendant, Home Indemnity Company of New York, caused to be filed in said state court actions the answers signed and verified by said George White, and delivered to it as last hereinabove found, but that, immediately after the filing of said answers it did deny any and all obligation to defend said actions, or either of them, on behalf of defendant George White, or any obligation or liability to George White under the policy of insurance issued by it, and did cause said Thomas P. Menzies, Esq., to withdraw as attorney for defendant George White.

15. The court further finds that at the time of the commencement of this action actual controversies existed between the parties as to the rights and obligations of plaintiff and defendant, Home Indemnity Company of New York, under their respective policies of insurance, and over the rights of the defendants, George White, James Carl Fitzgerald, James Richard Osborne, Michael Lee and Patricia Lee, under said policies of insurance; that said controversies were and are that defendant, Home Indemnity Company of New York, at the time of the commencement of this action, claimed and asserted and still claims and asserts that defendant George White had breached the condition of the policy of insurance issued by Home Indemnity Company of New York by failing to cooperate with it in the investigation of the accident hereinbefore described and in the defense of the actions in the Superior Court of the State of California hereinbefore described, and that because of said breach of condition it had been released from all obligations

under said [218] policy of insurance; that the plaintiff and defendants other than the defendant, Home Indemnity Company, contend that defendant, Home Indemnity Company, was at the time of the commencement of the actions and still is obligated to defend said actions in the Superior Court of the State of California in behalf of defendant, George White, and to pay any judgments rendered against him therein within the limits of its policy as hereinbefore found; that the plaintiff asserts and at the time of the commencement of this cause of action did assert that if defendant George White had failed to cooperate with the defendant Home Indemnity Company in the investigation of said accident and the defense of said actions, and had thereby breached the conditions of said policy issued by defendant Home Indemnity Company, he had likewise failed to cooperate with the plaintiff and had breached the conditions of its policy requiring cooperation on his part and that by reason of said breach it had been released from all obligations under its said policy, and further contends that its policy is a policy of excess insurance upon which it is only liable upon claims established against George White in excess of \$100,000.00 as to each of the persons killed in said accident, and that it is only so liable even though defendant White has breached the conditions of the policy issued by defendant Home Indemnity Company requiring him to cooperate with that company in the investigation of the accident and defense of said actions; that the defendants other than defendant Home Indemnity Company assert and at the time of the commencement of this action did assert that the defendant White has not breached the conditions of the plaintiff's policy as to cooperation, and that if defendant Home Indemnity Company has been



released from liability by reason of the breach of the conditions of its policy that the plaintiff's insurance constitutes primary insurance and that it is obligated to pay any judgments against the defendant White up to such limits of its policy as are hereinbefore found. [219]

16. The court finds that defendant George White has at all times cooperated with the defendant Home Indemnity Company of New York in the investigation of the accident hereinbefore described and in the defense of the hereinbefore described actions in the Superior Court of the State of California in and for the County of San Diego, and that defendant George White has not breached any of the conditions of the policy issued by the defendant, Home Indemnity Company of New York, or the plaintiff, Standard Accident Insurance Company of Detroit, upon his part to be performed.

17. The court finds that defendant George White did not, in reporting the accident hereinbefore described to the defendant Home Indemnity Company, make any false, conflicting, misleading or inconsistent statements of fact.

18. The court further finds that the defendant Home Indemnity Company of New York was not misled by any statement made to it by the defendant George White, or by any fact reported to it by said George White, and has not been in anywise prejudiced by any action or statement or omission of George White.

19. The court finds that George White did report to defendant Home Indemnity Company of New York that he fell asleep while driving the Lincoln automobile on the 20th day of July, 1946, at the time of the accident hereinbefore described, and that by reason of falling asleep he did not know that said accident had occurred. The

court further finds that defendant George White has never retracted said statement, but in fact has under oath testified to said statement of facts in this action and will testify to said statement of facts, if called upon so to do, at the time of the trial of the aforesaid actions in the Superior Court of the State of California.

The court further finds that there is evidence from which an inference might be drawn that George White knew that said accident had occurred and wilfully failed to stop and render aid, but the court finds that such evidence is not sufficient in this action to [220] prove that the statement of George White was wilfully false, and the court further finds that the defendant, Home Indemnity Company of New York, had the right to assume the defense of George White in said state court actions, and that it did assume the defense of said George White in said state court actions, and that having assumed said defense it was and is the duty of Home Indemnity Company of New York to attempt to establish the truth of the statement of George White, that he was asleep and did not know that the accident occurred, so long as said George White maintains that said statement is true, and that said Home Indemnity Company is estopped in this action to assert the untruth of said statement or to assert that by reason of said statement he has failed to cooperate with it in the investigation and defense of the claims made by the plaintiffs in said state court actions.

20. The court finds that it was the duty of defendant George White to plaintiff under the terms and conditions of the policy issued by plaintiff to cooperate with defendant Home Indemnity Company in the defense of said actions in the Superior Court of the State of California, and the court further finds that the defendant George

White has performed said duty and that, having co-operated with defendant Home Indemnity Company in the defense of said actions, there has been no breach by him of the conditions of plaintiff's policy requiring him to cooperate with it.

21. The court finds that the policy of insurance issued by said Home Indemnity Company of New York at the time of the commencement of this action did constitute, and does now constitute, valid and collectible insurance against the claims asserted in said actions in the state court in the sum of \$100,000.00 as to the claims asserted in each of said actions, and that by the terms of said policy defendant Home Indemnity Company is obligated to pay the cost of defending George White in each of said actions, and is obligated to pay any judgment rendered against him therein not exceeding a [221] judgment in the sum of \$100,000.00 in each of said actions; that the policy of insurance issued by plaintiff, Standard Accident Insurance Company of Detroit, did constitute at the time of said accident and has at all times constituted excess insurance over and above the insurance afforded as aforesaid by the policy issued by defendant Home Indemnity Company of New York, and that said Standard Accident Insurance Company of Detroit is obligated to pay such part of any judgment against George White rendered in either of said actions as is in excess of \$100,000.00, but not beyond the sum of \$25,000.00.

22. The court finds that the defendant Home Indemnity Company of New York was on the 20th day of July, 1946, and ever since has been and still is solvent and able to pay any judgments that may be rendered against

defendant George White in said state court actions within the limits of said policy of insurance issued by the defendant Home Indemnity Company of New York.

## CONCLUSIONS OF LAW

From the foregoing Findings of Fact the court concludes:

1. Defendant, Home Indemnity Company of New York, is obligated to pay the reasonable expense incurred by defendant, George White, in the defense of the action brought in the Superior Court of the State of California in and for the County of San Diego by defendants James Carl Fitzgerald and James Richard Osborne, being action No. 134630 in said court, and is obligated to pay the reasonable expense incurred by defendant, George White, in the defense of the action brought against him by Michael Lee and Patricia Lee in the Superior Court of the State of California in and for the County of San Diego, being action numbered 134918 in said court; that the defendant, Home Indemnity Company of New York, is obligated to pay any judgment rendered against defendant George White in said action in the Superior Court of the State of California in and for the County of San Diego, numbered 134630, up to but not exceeding the amount of \$100,000.00, [222] and is obligated to pay any judgment rendered against said George White in said action in the Superior Court of the State of California in and for the County of San Diego, numbered 134918, up to but not exceeding the amount of \$100,000.00.

2. That the insurance afforded by the policy issued by the plaintiff, Standard Accident Insurance Company

of Detroit, to the defendant, George White, constitutes excess insurance over and above that afforded by the policy of Home Indemnity Company of New York, and that under said policy the plaintiff is not obligated to pay any part of any judgment that may be rendered against said George White in either of said actions in the Superior Court of the State of California in and for the County of San Diego, except so much thereof as shall be in excess of \$100,000.00, but is obligated to pay such part of any judgment in either of said actions as is in excess of \$100,000.00, not to exceed however \$25,000.00 of such excess; that the plaintiff is not obligated to pay any part of the expense of defending said actions.

3. That judgment should be rendered herein declaring the rights of the parties in accordance with the foregoing Findings of Fact and Conclusions of Law.

4. That plaintiff and defendants, George White, James Carl Fitzgerald, James Richard Osborne, Michael Lee and Patricia Lee, do each have and recover their costs against defendant, Home Indemnity Company of New York, to be hereinafter taxed in accordance with the rules of this court.

Dated: February 27, 1947.

J. F. T. O'CONNOR  
District Judge

Approved as to form: Thomas P. Menzies, Harold L. Watt; by ..... [223]

Received copy of the within Findings this 21st day of Feb., 1947. H. L. Watt, Thomas P. Menzies, Attorneys for Home Ind. Co.

[Endorsed]: Filed Feb. 28, 1947. [224]

In the District Court of the United States  
Southern District of California  
Central Division  
No. 5729 O'C

STANDARD ACCIDENT INSURANCE COMPANY  
OF DETROIT, a corporation,

Plaintiff,

vs.

HOME INDEMNITY COMPANY OF NEW YORK,  
a corporation, GEORGE WHITE, JAMES CARL  
FITZGERALD, JAMES RICHARD OSBORNE,  
MICHAEL LEE and PATRICIA LEE,

Defendants.

### DECLARATORY JUDGMENT

This cause came on regularly for trial in the District Court of the United States for the Southern District of California, Central Division, before the Honorable J. F. T. O'Connor, Judge of said court, at 2:00 o'clock, P. M., on the 20th day of January, 1947, Paul Nourse, Esq., appearing in behalf of plaintiff, Standard Accident Insurance Company of Detroit, Thomas P. Menzies, Esq., and Harold L. Watt, Esq., appearing in behalf of defendant, Home Indemnity Company of New York, Edgar A. Luce, Esq., appearing in behalf of defendant, George White, John B. Lonergan, Esq., appearing in behalf of defendants, James [225] Carl Fitzgerald, James Richard Osborne, and Michael Lee and Patricia Lee, and evidence both oral and documentary having been introduced, and the cause having been submitted to the court for decision, and the court having signed and filed its written and special Findings of Fact and Conclusions of Law,

Now, Therefore, in accordance with the evidence and said Findings of Fact and Conclusions of Law, It Is

Ordered, Adjudged and Decreed as and for the Declaratory Judgment of this court, as follows:

1. That the instrument entitled, "Policy No. CAU 6011452," dated the 2nd day of December, 1945, copy of which is annexed to the answer of defendant Home Indemnity Company of New York herein as Exhibit A to said answer, and which has been received in evidence herein as Defendant's Exhibit C, was on the 20th day of July, 1946, and at all times since said date has been a valid and subsisting policy of liability insurance, and that the defendant, George White, is a person insured under said policy, that said George White has not breached any of the terms or conditions of said policy but has performed all of the terms and conditions of said policy upon his part to be performed; and that the insurance afforded by said policy is and at all times since the 20th day of July, 1946, has been valid and collectible.

2. That under and by virtue of the terms of said policy of insurance defendant, Home Indemnity Company of New York, is obligated to pay the reasonable expenses incurred by defendant George White in the defense of each of those certain actions now pending in the Superior Court of the State of California in and for the County of San Diego, entitled respectively, "James Carl Fitzgerald, a minor, by and through his Guardian ad litem, James Richard Osborne, and James Richard Osborne, Plaintiffs v. George White and North Lumberland Mining Company, Defendants," numbered 134630, and "Michael Lee, a minor, and Patricia Lee, a minor, by Mildred E. Taylor, their [226] Guardian ad litem, Plaintiffs v. George White, et al., Defendants," numbered 134918.

3. That defendant, Home Indemnity Company of New York, under and by virtue of the terms and conditions of said policy of insurance, is obligated to pay any judgment that may be rendered against said George White in said action numbered 134630 in said Superior Court of the County of San Diego up to but not in excess of the sum of \$100,000.00.

4. That defendant, Home Indemnity Company of New York, under and by virtue of the terms and conditions of said policy of insurance, is obligated to pay any judgment that may be rendered against said George White in said action numbered 134918 in said Superior Court of the County of San Diego up to but not in excess of the sum of \$100,000.00.

5. That the instrument, copy of which is annexed to the complaint on file herein, entitled "Policy No. J 427867," dated September 29, 1945, marked Exhibit A to said complaint, and which has been received in evidence herein and marked "Defendant's Exhibit B," was on the 20th day of July, 1946, and at all times since said date has been a valid and subsisting policy of liability insurance, and that the defendant George White is the person insured under said policy of insurance, and that defendant George White has not breached any of the terms or conditions of said policy upon his part to be performed, but has performed all of said terms and conditions; that the insurance afforded by said policy of insurance constitutes excess insurance over and above the insurance afforded by said policy of insurance issued by defendant, Home Indemnity Company of New York.

6. That the plaintiff is only obligated under and by virtue of said policy of insurance, received in evidence



and marked "Defendant's Exhibit B," to pay such amount, not exceeding \$25,000.00, of any judgment that may be rendered against George White in said action [227] No. 134630 now pending in the Superior Court of the State of California in and for the County of San Diego as shall be in excess of \$100,000.00, but is obligated to pay said amount of said excess.

7. That the plaintiff is only obligated under and by virtue of said policy of insurance, received in evidence and marked "Defendant's Exhibit B," to pay such amount, not exceeding \$25,000.00, of any judgment that may be rendered against George White in said action No. 134918 now pending in the Superior Court of the State of California in and for the County of San Diego as shall be in excess of \$100,000.00, but is obligated to pay said amount of said excess.

8. That the plaintiff, Standard Accident Insurance Company of Detroit, is not obligated to bear or pay any part of the expense of the defense by or on behalf of said George White of either of said actions, numbers 134630 and 134918, now pending in the Superior Court of the State of California in and for the County of San Diego.

9. That the plaintiff, Standard Accident Insurance Company of Detroit, and each of the defendants, George White, James Carl Fitzgerald, James Richard Osborne, Michael Lee and Patricia Lee, are entitled to judgment against defendant, Home Indemnity Company of New York, for their costs incurred herein, to be hereinafter taxed in accordance with the rules of this court.

Costs taxed at \$172.32.

Done in open court this 27 day of February, 1947.

J. F. T. O'CONNOR

District Judge

Approved as to form: Thomas P. Menzies, Harold L. Watt; by .....

Judgment entered Feb. 28, 1947. Docketed Feb. 28, 1947. Book C. O. B. 41, page 828. Edmund L. Smith, Clerk, by Francis E. Cross, Deputy.

Received copy of the within judgment this 21st day of Feb., 1947. H. L. Watt, Thomas P. Menzies, Attorneys for Home Ind. Co.

[Endorsed]: Filed Feb. 28, 1947. [228]

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[Title of District Court and Cause]

### NOTICE OF APPEAL

Notice Is Hereby Given That the defendant Home Indemnity Company of New York does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment given and made in the above entitled action in favor of the plaintiff therein and against the defendant Home Indemnity Company of New York, and entered on the 28th day of February, 1947, in Civil Order Book No. 41, page 828, and from the whole and every part of said judgment.

Dated this 26th day of May, 1947.

THOMAS P. MENZIES and  
HAROLD L. WATT

By Thomas P. Menzies

Attorneys for Defendant Home Indemnity Company of  
New York, a Corporation [229]

[Affidavit of Service by Mail]

[Endorsed]: Filed May 27, 1941. [231]

[Title of District Court and Cause]

## BOND ON APPEAL

Know All Men By These Presents:

That we, Home Indemnity Company of New York, as Principal, and Hartford Accident and Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut and authorized to transact a surety business in the State of California, as surety, are held and firmly bound unto Standard Accident Insurance Company of Detroit in the full and just sum of Five Hundred and No/100 (\$500.00) Dollars for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, successors, and assigns, jointly and severally, firmly by these presents:

Whereas, Home Indemnity Company of New York, Defendant, has on this 27th May, 1947, filed with the above court notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit of the State of California, and,

Whereas, the said court in the above entitled cause ordered said appellant to file an Appeal Bond in the sum of Five Hundred and No/100 (\$500.00) Dollars in compliance with Rule 73, Paragraph D of the Rules of Civil Procedure of the District Courts of the United States.

Now, Therefore, the condition of the above obligation is such that the Defendant and Appellant, Home Indemnity Company of New York shall prosecute said appeal

and will answer to the satisfaction of the judgment in full together with costs and interest if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs and interests as the Appellate Court may adjudge and award, then the above obligation will be void; otherwise to remain in full force and effect.

In Witness Whereof, the Principal has hereunto set its hand and seal, and the Surety has caused this bond to be executed by its duly authorized Attorney-in-Fact and caused its corporate seal to be hereunto affixed at Los Angeles, California, this 27th day of May, 1947.

HOME INDEMNITY COMPANY OF  
NEW YORK

By George Willsey

(Corporate Seal)

HARTFORD ACCIDENT AND INDEMNITY  
COMPANY

By Glen Huntsberger, Jr.

Attorney-in-Fact

Examined and recommended for approval as provided in Rule #8. Thomas P. Menzies, Attorney.

Bond approved

J. F. T. O'CONNOR

Judge

This Bond Carries an Annual Premium of \$10.00.

[Verified]

[Endorsed]: Filed May 27, 1947. [232]

[Title of District Court and Cause]

## CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 243, inclusive, contain full, true and correct copies of Complaint for Declaratory Relief including Exhibit A thereto which is Defendant's Exhibit B in Evidence; Answer of Defendant Home Indemnity Company of New York including Exhibit A thereto which is Defendant's Exhibit C in Evidence; Answer of Defendant George White; Answer of Defendants James Carl Fitzgerald et al.; Answer of Defendants Michael Lee et al.; Interrogatories Propounded by Plaintiff to Defendant Home Indemnity Company of New York; Answers of Defendant Home Indemnity Company of New York to Interrogatories Propounded by Plaintiff which includes Plaintiff's Exhibits 6 and 7 in Evidence; Interrogatories Propounded by Defendant Home Indemnity Company of New York to Plaintiff which is also Defendant's Exhibit A in Evidence; Answer to Interrogatories Propounded by Home Indemnity Company of New York to Plaintiff; Minute Order Entered December 23, 1946; Further Answer to Interrogatories Propounded by Home Indemnity Company of New York to Plaintiff which are also a portion of Defendant's Exhibit A in Evidence; Request of Defendant Home Indemnity Company of New York for Admissions Under Rule 36; Answer of

Plaintiff to Request for Admissions Under Rule 36; Answer to Request for Admissions Filed by Defendant Home Indemnity Company of New York; Request for Admissions Under Rule 36 of Plaintiff which includes Plaintiff's Exhibits 8, 12 and 13 in Evidence; Answer of Home Indemnity Company of New York to Request of Plaintiff for Admissions which includes Plaintiff's Exhibits 5, 9, 10 and 11; Amendment to Complaint; Plaintiff's Exhibits 1, 2, 3, 4, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23; Defendant's Exhibit N; Findings of Fact and Conclusions of Law; Declaratory Judgment; Notice of Appeal; Bond on Appeal; Defendant's Designation of Record on Appeal; Appellees' Designation of Additional Portions of Record to be Included in Record on Appeal and Plaintiff's Designation of Additional Portions of Record to be Included in Record on Appeal which, together with Original Defendant's Exhibits D, E, F, G, H, I, J, K, L and M and copy of two volumes of Reporter's Transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$61.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 19 day of June, A. D. 1947.

(Seal)

EDMUND L. SMITH,  
Clerk,

By Theodore Hocke,  
Chief Deputy Clerk

[Title of District Court and Cause]

Honorable J. F. T. O'Connor, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Monday, January 20, 1947

Appearances:

For the Plaintiff: Nourse & Jones, by Paul Nourse, Esq.

For the Defendant Home Indemnity Company of New York: Thomas P. Menzies, Esq., and Harold L. Watt, Esq.

For the Defendant George White: Luce, Forward, Lee & Kunzel, by Edgar A. Luce, Esq.,

For the Defendant Mildred E. Taylor, guardian ad litem of Michael Lee and Patricia Lee: William Guthrie, John B. Lonergan and Donald W. Jordan, by John B. Lonergan, Esqs. [1\*]

For the Defendant James Carl Fitzgerald, a minor, by his guardian ad litem, James Richard Osborne; and James Richard Osborne: Edgar B. Hervey, Esq., by John B. Lonergan, Esq. [2]

Los Angeles, California, Monday, January 20, 1947,  
2:00 P. M.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor. No. 5729 Civil, Standard Accident Insurance Company v. Home Indemnity Company and others; motion of plaintiff for leave to amend complaint and also for court trial.

\*Page number appearing at top of page of original Reporter's Transcript.

Mr. Nourse: I ask leave now to file the amended complaint which has been served on counsel and which is in accordance with the notice served 10 days ago.

The Clerk: Is it ordered filed, your Honor?

The Court: It is ordered filed.

You may proceed.

Mr. Nourse: I think that I can be of aid to the court by making an opening statement as to the issues here involved and the facts that are admitted. But I think Mr. Lonergan wished to state to the court that during today he is representing the defendants Fitzgerald and Osborne as well as the defendants Lee because Mr. Edgar Hervey found himself still engaged in a jury trial in San Diego County.

Mr. Lonergan: That is correct, your Honor. Mr. Hervey is engaged in trial and will try to be here in the morning. In the meantime he has asked me to represent him in appearing for the defendant James Carl Fitzgerald, a minor, and the defendant James Richard Osborne. [3]

I am appearing here, of course, as counsel of record for Michael Lee, a minor, Patricia Lee, a minor, and Mildred Taylor as their guardian.

The Court: Are all the parties now identified in the record?

Mr. Nourse: I think they are in the clerk's record, your Honor.

The Court: Identify them all, Mr. Cross.

The Clerk: Yes, your Honor. My record shows that Mr. Paul Nourse of Nourse and Jones is present in court as representing the Standard Accident Insurance Company of Detroit; also that Mr. John B. Lonergan is



present in court for Mildred E. Taylor, guardian ad litem of Michael Lee and Patricia Lee, and that today he also represents Mr. Edgar B. Hervey who is counsel for James Carl Fitzgerald, a minor, and his guardian ad litem, James Richard Osborne, and also for James Richard Osborne; that Mr. Thomas Menzies is in court together with Harold L. Watt and that these two lawyers represent the Home Indemnity Company of New York; that Edgar A. Luce is also present in court from the firm of Messrs. Luce, Forward, Lee and Kunzel, representing the defendant George White.

Do I understand that Mr. George White is present?

Mr. Luce: Yes, he is present.

The Court: Are you Mr. George White? [4]

Defendant George White: Yes.

The Clerk: That is what my record shows, your Honor.

The Court: Proceed.

Mr. Nourse: Your Honor, before I make my opening statement I think I can let one of the witnesses go. Mr. Hervey asked his client Osborne to come up to testify as to residence, but counsel I think are all willing to stipulate as follows:

That the Home Indemnity Company of New York is a corporation organized and existing under the laws of New York, a citizen of that state;

That the plaintiff, Standard Accident Insurance Company of Detroit, is a corporation organized and existing under the laws of the State of Michigan; that both of those insurance corporations are authorized to do business in this state:

That all of the other defendants, that is, George White, James Carl Fitzgerald, James Richard Osborne,

Michael Lee and Patricia Lee, are now and were at the time of the commencement of this action citizens of the State of California.

I believe that covers all the parties and the facts on which diversity of citizenship is established.

Is it so stipulated, gentlemen?

Mr. Menzies: So stipulated.

Mr. Lonergan: So stipulated.

Mr. Luce: So stipulated. [5]

Mr. Nourse: And if I may advise Mr. Osborne, who is up from down in San Diego County—

Mr. Lonergan: I will do it.

Mr. Nourse: I think he is seated right back there. I think I see him.

The Court: Mr. Osborne may be excused.

Mr. Nourse: This action, your Honor, is one for declaratory relief by which the parties seek to have their respective rights and liabilities under two separate policies of insurance declared by the court.

The facts out of which the controversies arise are as follows:

The defendant, Home Indemnity Company of New York, issued a policy of automobile liability insurance upon a Lincoln car which was the property of the North Lumberland Mining Company.

This policy of insurance had liability limits of \$100,000 for each person injured, not to exceed \$300,000 for claims arising out of any one accident.

The defendant George White was, on July 26, 1946, insured by a policy issued by the plaintiff on a Packard automobile and had a clause (and I will get the facts as clearly as I can before the court) that provided that if White's automobile was temporarily out of use through

repair and he was driving another car, that it should cover him while driv- [6] ing that car; but if there was insurance on the other car that his policy and the plaintiff's policy should be excess insurance over and above the valid and collectible insurance which was afforded by the policy on the other car.

White on the evening of July 20th, bound from Los Angeles to San Diego, was driving the Lincoln car insured by the Home's policy and with the limits of liability that I have mentioned.

On that night he was involved in an accident near Solano Beach.

In this accident two persons were killed. They had just been married, having returned from Tijuana, and were crossing the highway on foot at Solano Beach.

These persons were Claude McLester Lee and Leana Mae Lee.

White continued on to San Diego, was stopped by the police and later placed under arrest; and on July 22nd he made an oral report to the Home Indemnity Company.

The Court: What year?

Mr. Nourse: 1946. These facts all occurred in 1946, your Honor.

On the morning of the 23rd his statement was taken by Mr. Menzies, the attorney for the Home, and Mr. Clifton, its claims representative, which has been described and which will be before the court here as an exhibit to the answers of [7] the Home Indemnity to the plaintiff's interrogatories.

That statement contained a denial that Mr. White had been in any accident whatsoever. He said that he had no knowledge of being in any accident and also made certain statements as to damage to his car and he said

that the headlight had been damaged at the race track that afternoon and he described that damage; that the headlight was bashed in.

He later made a report to them orally or made it through his counsel (I am not sure which way the evidence will show) in which he stated that he had fallen asleep while near Solano Beach and awakened with his car moving down the highway; that from the evidence that he had then seen, pictures of the car, the fact there was human blood on it, the fact of the imprint of clothing, that he believed that the accident had happened there and that his car had hit and struck these people;

That on the 31st of July he pleaded guilty to a charge of hit and run driving.

The evidence will show that shortly after that time and after the Home had been advised of the plea of guilty (in fact, they were in court at the time it was made, present at the coroner's inquest and heard the evidence as to the damage to the car and examined the car) they were advised that White would not sign an answer which denied the happening of the ac- [8] cident because he did not believe such an answer was true.

The evidence will show that Mr. Menzies took to him answers in both the state court actions in which the happening of the accident was denied; that when Mr. White refused to verify those answers, he was advised by his counsel not to and they did not contain the truth:

That on August 23, 1946, White did sign and verify the answers which were substantially in the same form as the answers that had been prepared by Mr. Menzies, except that they did admit the occurrence of the accident and that these two persons died as a result of the injuries sustained therein. The deaths were admitted.

but the fact that the automobile, the Lincoln, had been the cause of death was denied in the answer tendered by Mr. Menzies.

The evidence will show that thereupon Mr. Menzies returned the answers to Mr. Holt, the attorney for Mr. White, or to Mr. White, I am not sure—it was a letter to Mr. Holt, anyway—stating that inasmuch as Mr. White had refused to sign the answers and that his statements to the company had been inconsistent; that they would not defend him;

That thereafter, however, they did telephone to the office of Mr. Holt, asked that the answers be returned and caused them to be filed—Mr. Menzies did—in the state court actions. [9]

I think the following day Mr. Menzies caused a motion to be filed or notice of motion in the Superior Court in each of the state actions asking to be relieved from the obligation to defend Mr. White further in those actions on the grounds that there was a conflict of interest between himself and Mr. White. I don't remember the grounds that Home had in denying liability.

The true controversy then that arises is this:

Has White so violated the Home's policy as to relieve it from its obligations, both to defend him in the state court actions and to indemnify him from any judgments that might be rendered therein?

If the court finds that the answers to that controversy or interrogatory, I might say, is in the negative and that he has not breached the Home's policy, that in effect brings an end to this litigation.

If, however, the court should find that there had been a breach of the Home's policy, that that breach was prejudicial to the Home and there will be a controversy on

the Home's part as to whether it need be prejudicial or not, then the remainder of the controversies comes in:

First, is the Standard's policy excess? I think one of counsel will contend that it was always co-insurance with that of the Home's.

If it was excess, has White also breached the terms of [10] that policy so as to relieve the plaintiff? And furthermore if he has not in that manner breached it, can he, by wilfully violating the Home's policy, change the position of the Standard Accident Insurance Company from the point where it had no obligation or liability until White had been held liable as to each person suing him in excess of \$100,000 to where it would be liable for the first dollar of any judgment?

The main controversy and the one which I believe will settle this thing is whether or not there has been a violation of this clause of the Home's policy which is the same clause, exactly the same words, as in the Standards policy. It is a condition of the policy and reads as follows:

"Assistance and cooperation of the insured. The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. . . ."

It is that clause which the Home claims to have been breached and by the breach of which it claims that it has been released from liability under its policy.

I think, your Honor, that the statement covers in substance the main facts, of course, not the details of the evidence. There are a number of admissions that have

been made, [11] however, by the pleadings; and I think I should state those to the court so that the court will see there is very little left to be proved by the plaintiffs and the defendants other than the Home to make a prima facie case against the Home and that the burden is then shifted to it to show the breach of the conditions and that it is excused from liability.

I think all the jurisdictional facts are admitted by the pleadings and by the stipulations which have just been made.

It is further admitted by the admissions of the Home, in answer to our interrogatories, that it was at all times solvent, is now and has at all times been solvent and financially able to pay the claim made against the defendant George White;

That the plaintiff issued the policy of insurance marked Exhibit A and attached to its complaint;

That the Home issued the policy attached to its answer and marked Exhibit A;

That White was driving the Lincoln automobile covered by the Home's policy and was driving it with the consent of the name assured therein, the North Cumberland Mining Company. It is admitted further that the Packard automobile insured by the plaintiff's policy was out of repair and so that the clause of that policy covering him while driving another car, subject to its terms, the insurance being excess, was in effect. [12]

It is admitted that while driving—

The Court: Just a moment, counsel.

Mr. Nourse: Yes, sir.

The Court: State No. 5, the last one, again, please.  
(Record read by the reporter.)

The Court: State the last one, No. 5, as I have it here, "Admissions."

Mr. Nourse: I haven't got them numbered.

The Court: Well, the last one.

Mr. Nourse: That White was at the time of the accident driving the Lincoln automobile and that that was with the consent of the named assured in that policy, the North Lumberland Mining Company;

That at that time—I am going back a little ways, your Honor, so as to pick it up.

The Court: Yes. I have that one. All right.

Mr. Nourse: That at that time the Packard automobile described in the policy was out of repair, temporarily out of repair.

The Court: So that condition applied?

Mr. Nourse: So that the condition of the policy extending coverage to the use of another car applied.

That on the evening of July 20th the accident in question occurred;

That the car collided with Claude McLester Lee and Leana [13] Mae Osborne Lee; that as a result of the injuries therein sustained they died.

It is further admitted that Michael Lee and Patricia Lee have brought an action against George White in the Superior Court of the County of San Diego in which they claim to be the children and sole heirs at law of Claude McLester Lee and claim that by reason of his wrongful death they have been damaged in the sum of \$50,000 and that that action is on account of the death of Claude McLester Lee in the accident which is described in the complaint;

That James Fitzgerald and James Osborne have commenced an action against defendant George White in



which they claim they are respectively the son and father of Leana Mae Osborne Lee and that by reason of her death James Carl Fitzgerald has been damaged in the sum of \$50,000 and James Richard Osborne in the sum of \$500.

It is further admitted that the defense to each of those actions was tendered to the defendant Home Indemnity Company and that it did accept the defense of such actions and did employ an attorney, to-wit, Thomas B. Menzies, to defend each of said actions on behalf of the defendant White.

It is further admitted that the Home Indemnity Company now denies any liability to George White under its policy and did make such denial prior to the commencement of this action;

That it had prior to the commencement of the action and [14] still does refuse to defend the state court actions or to pay any judgments against White.

That portion of the complaint was denied by Mr. Hervey in his answer on behalf of Fitzgerald and Osborne, but I understand that he now stipulates that the facts which I have just related as to the denial of liability—well, he desires to admit (and I can make it shorter than that) the allegations of paragraphs XVI and XVII of the complaint. That is XVII as amended?

Mr. Lonergan: As amended.

The Court: Who is it that denies that?

Mr. Nourse: Fitzgerald and Osborne had denied it, your Honor, in their answer for want of information and belief. I understand they now withdraw those denials and admit the facts alleged in paragraphs XVI and XVII as amended.

Is that true, Mr. Lonergan?

Mr. Lonergan: That is correct.

Mr. Nourse: That leaves to make a prima facie case here—

The Court: What are XVI and XVII so we will have that connected up in the record?

Mr. Nourse: The allegation of paragraph XVI—shall I read the whole paragraph?

The Court: Yes.

Mr. Nourse: "That the defense of said actions No. [15] 134918 and No. 134630 was, by the defendant George White tendered to defendant, Home Indemnity Company of New York, and that said Home Indemnity Company of New York did accept the defense of said actions, and did employ an attorney, to wit, one Thomas P. Menzies, to defend each of said actions on behalf of defendant George White herein, but that said defendant, Home Indemnity Company of New York, does now deny any liability to defendant George White under its policy of insurance issued to said North Lumberland Mining Company, and refuses to further defend or cause to be defended said George White in said actions, or either of them. Plaintiff is informed and believes, and therefore alleges, that said defendant, Home Indemnity Company of New York, will refuse to pay any judgment that may be rendered in said action No. 134918 or in said action No. 134630 against defendant herein, George White, or to pay any part of any such judgments, or to in anywise perform any of the terms or conditions of the policy of insurance issued by it as aforesaid."

As amended, your Honor, it is very long; and it merely sets forth the controversies that exist here, what the claims of each party are.

Does your Honor desire to have it read?

The Court: No. I just wanted to know what the subject of it is.

Mr. Nourse: Now I shall make the rest of the prima [16] facie case, your Honor, through the introduction of certain pleadings here so the court may be fully advised as to the condition of the state court actions and by certain admissions made in the request for admissions by the Home Indemnity Company.

I offer now a copy of the complaint in the action of James Carl Fitzgerald, a minor, by and through his guardian ad litem, James Richard Osborne, and James Richard Osborne, vs. George White and North Lumberland Mining Company, defendants; action No. 134630, in the Superior Court of the State of California, in and for the County of San Diego.

The Clerk: Admitted, your Honor?

The Court: Admitted.

The Clerk: That will be Plaintiff's Exhibit No. 1.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Nourse: Counsel for the defendants, Lee, called to my attention that he also had denied paragraph XVII but now admits XVII and now admits the facts as therein alleged.

Mr. Lonergan: That is correct, your Honor.

The Court: The record will so show.

Mr. Nourse: I now offer the answer filed by the defendant George White in action No. 134630 in the Superior Court of the State of California, in and for the County of San Diego. [17]

The Court: In evidence.

The Clerk: Plaintiff's Exhibit No. 2 in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Nourse: I now offer the complaint in the action, Michael Lee, a minor, and Patricia Lee, a minor, by Mildred E. Taylor, their guardian ad litem, plaintiff's, vs. George White, John Doe and Doe Corporation, defendants, being action No. 134918, in the Superior Court of the State of California, in and for the County of San Diego.

The Court: In evidence.

The Clerk: Plaintiff's Exhibit No. 3 in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Nourse: I now offer the answer filed by the defendant George White or on his behalf to the complaint in action No. 134918.

The Court: In evidence.

The Clerk: Plaintiff's Exhibit No. 4 in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 4.)

Mr. Nourse: The file has gotten a little voluminous, your Honor.

I now offer in evidence the admission by the defendant, Home Indemnity Company, in answer to the plaintiff's inter- [18] rogatories No. 20. The interrogatory is as follows:

"That at all times from July 20, 1946, to and including August 23, 1946, Thomas B. Menzies was acting as attorney for you."

This interrogatory being addressed to the defendant Home Indemnity Company, the answer being:

"To request No. 20 admits that at all times from July 20, 1946, to and including August 23, 1946, Thomas B. Menzies was acting as attorney for this defendant."

The Court: That is Home Indemnity Company?

Mr. Nourse: Yes, Home Indemnity, the defendant Home Indemnity Company.

I next offer in evidence their answers to our interrogatories.

Mr. Menzies: Answers of the Home?

Mr. Nourse: Yes, answers of the Home Indemnity Company to plaintiff's interrogatories 5, 8, 9 and 10. If you will bear with me a minute, I will get my fingers in the right place here so I can refer back and forth.

Interrogatory No. 5 is:

"Did the defendant George White report to you the accident described in paragraph XIII of the complaint on file here?"

I will read all of the interrogatories and the answers as they all connect up, your Honor. [19]

The Court: That is connected with the former part. That means, Did George White make a report to the Home Indemnity Company?

Mr. Nourse: That is right, your Honor.

The Court: Proceed.

Mr. Nourse: "8. If your answer to interrogatory No. 6 is that said report was not in writing, state whether or

not the report was made before and reported by a shorthand reporter.

"9. If your answer to interrogatory No. 8 is that said oral report was recorded by a shorthand reporter, state the name of the reporter and whether or not you have a transcript of such report.

"10. If your answer is you have a transcript of the said report, attach a full, true and complete copy of such transcript."

The answer being:

"5. Yes," which is that it was reported to them.

8. that it was taken down in shorthand; that it was before R. B. Whitcomb, official shorthand reporter, and that they had a transcript; and 10 sets forth the transcript.

We now offer the answers and the transcripts of the report of George White, taken on August 23rd and which is attached to the answers of the defendant Home to the plaintiff's interrogatories. [20]

The Court: In evidence.

Mr. Lonergan: Was that July 23rd?

Mr. Nourse: I should have said July. Thank you.

The Court: I have July 20th to August 23rd.

Mr. Menzies: That's right.

Mr. Nourse: I now offer the answers of the Home to the plaintiff's interrogatories Nos. 13 and 14. The interrogatories were:

"If your answer to interrogatory No. 5 is . . ."

Mr. Menzies: Pardon me, Mr. Nourse. Did the court number interrogatories 5, 8, 9 and 10?

The Court: 5, 8, 9 and 10.

Mr. Menzies: That is marked Exhibit 6, and I assume that will be Exhibit 7 now that you are offering? Or are you offering the whole as one?

The Court: Whichever way counsel desires. The court has no preference.

Mr. Nourse: I think they should be exhibits in order; so in the record they will be referred to.

The Clerk: I have not been numbering these, your Honor, because I didn't have them.

Mr. Nourse: They are in the record now. I do not presume it is necessary to remove them from the record and offer them in. They are part of the files in this action.

The Court: That will be sufficient identification, be-[21] cause counsel can pick them up in the record.

Mr. Menzies: That is satisfactory. But I noticed here that one clerk was not numbering them, and I had been numbering them and I wanted to get them corrected.

All of the interrogatories will be Exhibit 5, then, I take it?

Mr. Nourse: Each one as offered will be separate. Now, this one I am about to offer is 13.

Mr. Menzies: I think it is confusing to the clerk when they are all numbered in there, your Honor. I would suggest that we offer them all, if you intend to, or you can withdraw all that you don't intend to offer.

Mr. Nourse: I am now offering, your Honor, in evidence defendant Home Indemnity Company's answer to plaintiff's interrogatories Nos. 13 and 14.

The interrogatories were: "If your answer to interrogatory No. 5 is that George White did report to you said accident, state whether or not after the date of his original report he made any further report to you of any fact concerning said accident or his knowledge thereof."

"14. If your answer to interrogatory No. 13 is that he did make a further report, attach a copy thereof hereto. If said additional report was in writing or if it was oral, state the substance of said additional report and give the date of making of said additional report and the name and addresses [22] of the persons present."

The answer is to both interrogatories by their answer 13, which is as follows:

"In answer to the 13th interrogatory it saith:

"He did not report any additional facts of his knowledge of the accident other than that he said 'he must have gone to sleep' and that 'he might have hit the victims while asleep without knowing it.' "

They did not supply the date of that information or the names of the persons to whom it was made.

Right there it calls my attention to the fact that you failed to verify or swear to your interrogatories in accordance with the rules. And you waive that?

Mr. Menzies: Certainly.

Mr. Nourse: You do not raise any question as to the fact that he had not sworn to it?

Mr. Menzies: No, Mr. Nourse, we won't. We did on that like you did on the first interrogatories.

Mr. Nourse: I now offer in evidence, your Honor, the answer to request for admission No. 19 made by the plaintiff to the defendant Home Indemnity Company, and with that offer Exhibit J attached to the request for admission, No. 18 reading:

"That the copy of the letter annexed hereto . . ."

The Court: 18. You referred to 19? [23]

Mr. Nourse: If I did, your Honor, I should have said 18.



The Court: All right.

Mr. Nourse: 19 will come next.

The Court: All right. Proceed.

Mr. Nourse: "... that the copy of the letter annexed hereto and marked Exhibit J is a full, true and correct copy of a letter written by John T. Holt to Thomas P. Menzies and received by Thomas P. Menzies."

The answer is that they admit that fact.

I shall now read to the court, if I may, so that the court will be advised, Exhibit J. This is on the letterhead of John T. Holt.

"Thomas P. Menzies,  
"Attorney at Law,  
"1014 Fidelity Building,  
"548 South Spring Street,  
"Los Angeles 13, California.

"Dear Mr. Menzies:

"Please find enclosed truthful answers verified by George White in the Fitzgerald vs George White case Michael Lee et al., vs. George White Case. Mr White has always cooperated and has been willing to do so. As you will remember, he has demanded of you on numerous occasions that you present to him the first statement you took from him to make corrections. You at all times have refused to do so. As you remember, he told you within twelve hours after the first statement that he had made to you that he remembered falling asleep and hav- [24] ing awakened while driving the car and that the accident could have happened then. If you will remember several days after this and a very short time after the accident itself, you and I talked by telephone and I asked you to

remember the conversation, which I am sure you do, at which time I reiterated over and over again that George White had stated to me and wanted it again relayed to you that he had fallen asleep at or near the scene of the accident and that he may have hit the people at that time without his knowledge. I merely wish to refresh your recollection about this matter, because I have offered myself as witness in this regard.

“Mr. White makes demand upon you to defend the above referred to cases. It is our understanding that it is the duty of your Company to defend Mr. White and the other defendant in the cases, and Mr. White expects you to do so.

“Very truly yours,  
“John T. Holt.”

I offer next the letter attached to the answers of the Home Indemnity to our request for admissions and which constitutes their reply to our request No. 19.

The Court: 18 is in evidence.

Mr. Nourse: I offer Exhibit A to the answer of Home Indemnity Company of New York to plaintiff's request for admissions, which is the following letter on the letter-head of Mr. Thomas P. Menzies. [25]

“Mr. John T. Holt,  
“Attorney at Law,  
“Suite 1114 San Diego Trust  
“& Savings Building,  
“San Diego 1, California.

“Dear Mr. Holt:

“This will acknowledge receipt of your letter of August 23rd, together with the enclosures. . . .”

The Court: What is the date of that letter?

Mr. Nourse: This letter is undated, your Honor; but it is referred to in the answer 19 as having been dated August 26th.

The Court: All right.

Mr. Nourse: The copy they attached was undated.

"This will acknowledge receipt of your letter of August 23rd, together with the enclosures.

"I am returning herewith the original answer in Lee against White, the original answer in Fitzgerald against White, and am retaining a copy for my files.

"Please be advised that the answer in Fitzgerald against White was due on the 22nd of August.

"I take it from your letter that you are now representing Mr. White in the above mentioned civil matters.

"I gather from your letter that your client has made inconsistent statements to you as well as to us and in view of all circumstances surrounding this matter, the Company denies liability in both of these cases." [26]

I now offer in evidence the Home's answer to the plaintiff's request for admission No. 25. No. 25 reads as follows—

The Court: 19 is in evidence.

Mr. Nourse: They were requested to admit the truth of the following:

"That the statement in said letter, marked 'Exhibit J,' herein, that:

" ' . . . several days after this . . . ' "

And this is the letter of August 23rd that I have read your Honor.

" ' . . . and a very short time after the accident itself, you and I talked by telephone and I asked you to remember

the conversation, which I am sure you do, at which time I reiterated over and over again that George White had stated to me and wanted it again relayed to you that he had fallen asleep at or near the scene of the accident and that he may have hit the people at that time without his knowledge.'

"is a true statement as to the facts related to you through your attorney, Thomas P. Menzies, Esq., over the telephone at the time indicated in the quoted statement."

To which they made reply to request No. 25:

"... defendant admits that on or about July 29, 1946, said John T. Holt, in a telephone conversation with Thomas P. Menzies, attorney for defendant Home Indemnity Company, made [27] the statements referred to in said requests; that none of this defendant's agents, servants or employees were present at any conversation between John T. Holt and the defendant George White, and this defendant has no knowledge as to what, if anything, transpired between George White and John T. Holt."

The Court: In evidence.

The Clerk: That will be 20.

Mr. Nourse: I now offer in evidence plaintiff's request for admissions of the Home Indemnity, No. 26, which is as follows:

"That the defendent, Home Indemnity Company of New York, is now and has at all times since the 19th day of July, 1946, been solvent and financially able to pay the claims made against George White by plaintiffs in actions Nos. 134630 and 134918 in the Superior Court of the

State of California, in and for the County of San Diego, as set forth in the copies of the complaints in said actions, Exhibits C and F annexed hereto.”

Those are the complaints that have already been received in evidence, your Honor.

The Court: What is the answer to that inquiry?

Mr. Nourse: And the answer to that request is:

“To request No. 26, this defendant admits the statements in said request contained.”

The Court: In evidence. [28]

The Clerk: 26, is that, your Honor?

The Court: 26.

Mr. Nourse: With that, your Honor, I think that concludes the plaintiff’s case in chief and shows that White was driving an automobile upon which there was a policy of insurance, to wit, the Home’s policy, when an accident occurred.

The claims have arisen that policy, against White, as to risks covered by the policy, to-wit, the liability incurred upon him by law for damages arising out of the use or operation of the Lincoln automobile. It proves that notice has been given to the Home and that the Home has denied liability.

The burden of proof undoubtedly under the decisions, your Honor (and I am glad to give them to you), is on the Home to plead and prove any breach of the conditions of the policy.

On that point, your Honor, I shall state now, as your Honor may want some assistance from counsel in the way of authorities, that it is the contention of the plaintiff—and may I speak for you gentlemen?—that not only must the Home show a breach, a technical breach, of the condition of the policy; but it must show that that was as to a

substantial matter materially affecting it, either in its decision whether or not to settle claims or to defend them or in the defense of the pending actions. And without that showing, [29] some showing that some defect or misstatement of fact prejudiced it, it has no defense under the policy.

I will state to your Honor, frankly, that for many years we thought that was the law in this state. It was so announced as the law in the case of *Hynding v. Home Accident Insurance Company*, 214 Cal. 743, and it was followed as being a proper statement of the law in *Panhens v. Associated Indemnity Company*, 8 Cal. App. (2d) 532.

Does your Honor want the Pacific citations?

The Court: No, I do not have Pacific.

Mr. Nourse: And *Norton v. Central Surety & Insurance Company*, 9 Cal. App. (2d) 598; also *Wormington v. The Associated Indemnity Company*, 13 Cal. App. (2d) 321.

It was also followed by the Circuit Court of Appeals for the Ninth Circuit in the case of *Western Casualty and Surety Co. v. Weimar*, 96 Fed. (2d) 635.

However, in 1939 in the case of *Valladao v. Firemen's Fund Insurance Company*, 13 Cal. (2d) 322, the Supreme Court said that the language used in the—

The Court: Are you quoting the Supreme Court now in this opinion? You said "the Supreme Court said."

Mr. Nourse: The Supreme Court of California.

The Court: Said in the—

Mr. Nourse: In the *Valladao* case.

The Court: Said in California Appeals, yes. [30]

Mr. Nourse: That is its own decision in *Hynding v. Home*, that it was necessary to show prejudice was

obiter dicta, not necessarily the decision in this case but further said they still would not decide it. They said, "We don't need to decide it here because prejudice is present as a matter of law, and whether or not they have to prove it in order to establish a defense we will not decide.

And they have not decided. The Supreme Court of this state, except by inference in a case where I myself would assume it was against dicta—I don't believe I have that case in this memorandum, but I can give it to you at a later time—but I would also direct your Honor's attention to a Circuit Court case from this circuit which was decided in a case arising in Oregon, Pacific Indemnity Company v. McDonald, 107 Fed. (2d) 446. My reason for calling your Honor's attention to that is that the law here is in a state of flux, and it is going to be for your Honor to determine what the law of this state is and, I presume, from the law announced in other jurisdictions.

I should be glad to call your Honor's attention to a large number of cases from those jurisdictions if you desire.

The Court: It is about time for our afternoon recess, gentlemen.

(Brief recess.) [31]

Mr. Nourse: If your Honor please, the clerk and the reporter and counsel say that I have mixed up this record. I have gone over it with the clerk, and he has now Exhibits 1 to 11 which cover everything that we offered. That covers under one exhibit several interrogatories on several occasions, all dealings with the same subject matter which I offered. I think the clerk's record is correct now.

Mr. Luce, Mr. Watt checking, and I have gone over it with the clerk; and I think the clerk's record is correct.

The Court: All right. If we find anything to correct, gentlemen, later, of course we will have it corrected.

You may proceed, Mr. Menzies.

Mr. Menzies: May it please the court, before we proceed any further in this matter it may be that both Mr. Nourse and myself may be witnesses in this case, and I should like to inquire as to whether or not the court is going to invoke the rule as to both of us in so far as our participation in the trial is concerned?

The Court: There is no jury here, gentlemen. I can see no reason at all to exclude counsel from participating in the trial because they are going to give some testimony.

Mr. Menzies: Very well, your Honor.

The Court: I shall certainly permit the attorneys to present any information they desire under oath to the court, and I shall permit the attorneys to argue the matter fully, [32] even referring to their own testimony.

Mr. Menzies: Thank you. There is one other thing, too, your Honor. I take it from counsel's statements that inasmuch as the defendant Home Indemnity Company has the affirmative that we will have the right to open and close our argument?

Mr. Nourse: The affirmative of one issue only, your Honor. We have made a prima facie case, and they only now have the issue of establishing a defense. They are in no different position than in any other lawsuit where by their admissions of the pleadings and certain facts a prima facie case is proved with very little evidence. But it does not follow that because they have the burden of establishing a defense that that should be the situation.



and that is what it is, even though in this declaratory relief action they have the right to open and close.

The Court: It makes very little difference, gentlemen, where a matter is tried before the court. It makes a considerable difference in a matter tried before a jury as to the order in which arguments are made. However, it would seem to me that this is a declaratory action and the plaintiff has the right to open and close.

Mr. Menzies: That would be true, your Honor, were it not for the pleadings in this case. The pleadings as they now stand, and as I understand them, are in this condition: [33] that the plaintiff Standard Accident and the defendant Home Indemnity Company, in so far as the application of the evidence in this case, would be in the identical position. If the Home prevails in the action, then also the Standard Accident is relieved of any liability.

It is our contention here that they are in no different position than we are unless they are asserting that statements which were made by the defendant White are true and correct.

They have offered in evidence those statements, and they have placed in their pleadings here by their amendment a request for an adjudication, that in the event the court finds that those statements have been false and misleading that they would be relieved of liability.

That being the case, I can see no distinction between their position in this case and ours. We, therefore, would have, I take it, the duty of carrying forward, and in so doing we would have to assert the affirmative here and would have, as I understand the decisions, the right to open and close the case.

The Court: If you are both in the same position, I cannot have you both opening and both closing. It does not make any difference, gentlemen. I shall give you every opportunity to present everything that you have, and if you think of some other authorities after you leave, send a copy to op- [34] posing counsel and send it to me.

Mr. Menzies: All right, your Honor, thank you.

Mr. Nourse: I want one thing made clear. Mr. Menzies calls my attention to it. He is right: our positions are the same under certain circumstances.

We have, however, set up here and asked a declaration of the rights, first that the Home be held in because if they are held in we haven't anything in the fire.

I spoke to counsel for the other defendants and asked if they desired me to proceed to put on the prima facie case against the Home and if they would agree that by so doing I should not be estopped, should your Honor find that the Home's position is right here, from asserting that the Standard is also relieved and that they did so agree. Is that correct, gentlemen?

Mr. Lonergan: That is correct, your Honor. If I may be heard for a moment—

The Court: Yes.

Mr. Lonergan: —to point out our position on the point, your Honor.

The Court: You represent—

Mr. Lonergan: I represent the children, your Honor.

The Court: Yes.

Mr. Lonergan: Of the decedents.

The Court: All right. [35]

Mr. Lonergan: It is our position that if your Honor should find that the Home is released, that nevertheless the Standard Accident is not released, unless under the same

facts or whatever different facts may appear your Honor should also find that they are released. In other words, I believe that different facts apply to the defendant insurance companies.

I do not want to be put in the position of sitting silent while there is a statement made that they think that if one is released the other is released.

The Court: We will hear all the facts, gentlemen. I shall give you plenty of opportunity. Proceed.

Mr. Menzies: We expect to prove, your Honor, in this case, as indicated by Mr. Nourse, that an accident occurred on or about the 20th of July in the County of San Diego.

The Court: You will not have to prove that.

Mr. Menzies: That is true. But we will have to prove, and expect to prove, the facts and circumstances surrounding that accident.

The Court: All right.

Mr. Menzies: For the purpose of showing that not only was the statement as given to the Home Indemnity on the 23rd of July, 1946, misleading, but also that the subsequent correction was false and misleading.

We expect to prove both of those statements are misleading and false. [36]

As to the law that applies to the case, we would like to call your Honor's attention to this fact: that the policy was written and issued in the state of California.

I might ask counsel if they will stipulate to that fact. The policies are in evidence or on the pleadings, and they do show the place of issue.

Will you so stipulate?

Mr. Nourse: I will stipulate on the part of the plaintiff that both policies were written and issued in the state of California.

Mr. Menzies: And as to the other counsel?

Mr. Luce: Yes, we will so stipulate.

Mr. Lonergan: So stipulated.

Mr. Menzies: That being the case, we contend that the law of California applies to this particular litigation; and we also feel that under the authorities that the federal rule is the same.

The court will note in the Valladao case, which is reported in 13 Cal. (2d) 342, which Mr. Nourse cited to you, a quotation from the leading federal case on that subject, which is *Buffalo v. U. S. Fidelity & Guaranty Company*, and will be found in 84 Fed. (2d) at page 883.

There is also the *Ocean Accident and Guaranty Corporation v. Lucas*, 74 Fed. (2d) 115, which holds the same as the *Buffalo* case, that cooperation within a liability policy re- [37] quiring the insured to cooperate with the insurer means there shall be a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense.

“Wilful falsification of a material fact by the insured would violate the policy requiring insured to cooperate with insurer in all matters which the insurer deems necessary in the defense of the suit.”

It is our contention here that the evidence will show that we still don't know from the defendant White what actually happened at this accident; that both of the statements are misleading and that if we were forced to defend the pending actions in San Diego County that we

would be faced with the situation of a defendant who had given us inconsistent statements and who, in addition thereto, had entered a plea of guilty to a charge of violation of Section 480 of the California Vehicle Code which is the California hit-and-run statute.

We expect that this evidence will show that an automobile traveling south on San Diego-Los Angeles Highway at or about the hour of 10:30 collided with two human beings, a man and a woman, Mr. and Mrs. Lee;

That that automobile prior to the collision was seen; that the brakes were applied to the car; that the noise of the application of the brakes was heard by several of the [38] witnesses; that the impact occurred at or about the same time as the application of the brakes; that the car slowed down but then went on its way; that thereafter at or near the city limits of San Diego in the County of San Diego a car was stopped, a Lincoln Zephyr sedan, by Officer Cassin of the San Diego Police Department;

That he stopped this car pursuant to a radio broadcast, and in seeking it coming down the highway noticed that the left front headlight was not burning;

That on stopping the car he found that the defendant White was operating the car and that there was no one else in the car;

That he questioned the defendant White as to where he received the damage to the car;

That the defendant told him that it had been received at the Santa Anita race track;

That he then took the defendant White to the San Diego police station;

That at no time between the time of the stopping of the car or until Officer Cassin and the defendant arrived

at the San Diego police station did the defendant get out of the car or evidence any interest in the damage to the left front fender or the headlight;

That there at the San Diego police station he again evidenced no interest in it but got out of the right-hand [39] side of the car and went into the police station and remained there;

That two officers' from the California Highway Patrol, Officer Hake and Officer McCreary arrived, conversed with the defendant, the defendant saw the car, saw the officers taking photographs of the car and he said to Officer Hake that he didn't know how the damage to the car had been sustained;

That he later entered a plea of guilty to a charge of violation of Section 480 of the Vehicle Code and was thereafter granted a hearing on an application for probation and at the hearing he made the same contention to the court there that has been made here: that he didn't know that he had hit anyone and that he must have been asleep and he might have hit them while he was asleep.

Those, briefly, your Honor, are the facts that we expect to prove in this case.

Pardon me. Mr. Watt calls my attention to something.

(Brief pause in the proceedings.)

Mr. Menzies: Not only is there the sworn statement which has been attached to the interrogatories, but also there was an oral statement substantially the same as the sworn statement that was transcribed by Mr. Whitcomb, the court reporter.

At this time we would like to offer in evidence all of [40] the interrogatories, those requested by the plaintiff of the defendant, and ask that they be marked as Defendant's Exhibit—what would that be, Mr. Cross?

The Clerk: "A."

Mr. Menzies: "A."

Mr. Nourse: To which, your Honor, we object on the ground that those are self-serving answers to interrogatories, not being requests for admissions. They cannot be offered by the party who answered the interrogatories.

They are incompetent and irrelevant to prove any issue in this case.

The Court: They can be used for impeachment.

Mr. Nourse: But they are offering their own answers to interrogatories as proof of those facts. That is not competent evidence. It is so stated in the rules.

The Court: At this time I shall deny it and give you opportunity before the close of the case to offer it. It will develop in the testimony.

Mr. Menzies: Then I will offer as Exhibit A, your Honor, the reservation of rights which was attached to the defendant Home's reply to the interrogatories.

Mr. Nourse: Right there, your Honor, I call your attention to the fact that that was directed to us alone, and our answer to it said that we did not know it; we had never seen it. And since then I will say to your Honor I have talked to [41] Mr. White and his memory of signing it is very faint, and I think that the testimony should be offered to show the surrounding circumstances of the signing of that instrument.

It certainly could not be introduced on our admission because we only admitted it upon the statement that counsel had told us it had been signed.

Mr. Menzies: You had the order of the court directing you to do so.

The Court: Well, I shall deny that at this time. As I say, I shall permit you to reopen and make the offer at the close of the case if I find that justice requires it.

Mr. Menzies: Very well, sir. We will offer in evidence at this time the defendant Home's interrogatories addressed to the plaintiff and the replies of the plaintiff thereto and ask that they be marked as Exhibit A.

The Court: Same ruling.

Mr. Menzies: And we will offer the answers of the Standard Accident to those interrogatories and ask that they be marked in evidence.

Mr. Nourse: No objection on plaintiff's part. I cannot speak for the others.

Mr. Luce: Of course, they are not binding, if your Honor please, upon the defendant White.

The Court: What is your position, Mr. Lonergan?

Mr. Lonergan: The same as the defendant White, your [42] Honor; they are not binding on us.

The Court: In evidence.

Mr. Menzies: They have been received?

The Court: Yes.

Mr. Menzies: That is, they are marked Exhibit A?

The Court: Yes.

(The documents referred to were received in evidence and marked Defendant's Exhibit A.)

Mr. Menzies: Mr. Briggs, will you take the stand, please?



HENRY T. BRIGGS,

called as a witness by and in behalf of the defendant Home Indemnity Company, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Henry T. Briggs.

The Clerk: Is that B-r-i-g-g-s?

The Witness: That's right.

Direct Examination.

By Mr. Menzies:

Q. What is your business or occupation, Mr. Briggs?

A. I am an automobile mechanic.

Q. Where are you employed?

A. Well, at the time of the accident I was located in Leucadia, California, but I am now in Encinitas. [43]

Q. Now, directing your attention to on or about the 20th day of July, 1946, did you witness an accident at or near Solano Beach in the County of San Diego?

A. Yes, I did.

Q. Were you in an automobile at that time?

A. Yes.

Q. Or were you a pedestrian?

A. I was in an automobile.

Q. What kind of automobile were you driving?

A. A 1946 Plymouth.

Q. In which direction were you traveling and on what road?

A. I was on Highway 101 going towards Los Angeles, north.

Q. What time of the day or night was it?

A. Oh, it was around a little after 10:00.

(Testimony of Henry T. Briggs)

Q. By Mr. Menzies: Now, which did you hear first: the thud or the screech of the brakes?

A. Well, it was like a thud, then screech and he went on and I figured—

The Court: Not what you figured, just what you saw, just what you heard.

The Witness: Well, when the body came rolling towards me I just pulled off the side of the road and got out of my car, and I—I have to figure something here.

Q. By Mr. Menzies: Can you describe the noise there at the scene of the accident?

A. Well, it all happened so fast that I just seen them get hit and the people come rolling towards me, and I just pulled off the road.

Q. What did you hear there?

A. A thud and a squeal of brakes.

Q. Can you describe whether that was a loud or a dull thud, or what?

A. Well, it wasn't loud, but it was loud enough so I could hear it.

Q. 175 feet away? A. Yes. [47]

Q. Was there other traffic?

Mr. Nourse: Just a moment. The witness did not testify he was 175 feet away when the accident occurred, I don't believe, your Honor.

The Court: That is the way I have it in my notes.

Mr. Nourse: That is when he first saw the people.

The Court: Let us clear it up. Do you understand the difficulty here?

The Witness: Yes, I see.

The Court: How far, now, was the car that was coming towards you from the north?

No. 11661  
IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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HOME INDEMNITY COMPANY OF NEW YORK,  
Appellant,

vs.

STANDARD ACCIDENT INSURANCE COMPANY  
OF DETROIT; GEORGE WHITE; JAMES CARL  
FITZGERALD; JAMES RICHARD OSBORNE;  
MICHAEL LEE and PATRICIA LEE,  
Appellees.

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(In Two Volumes)

VOLUME II

(Pages 235 to 479, Inclusive)

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

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FILED  
SEP 28 1947

PAUL P. O'BRIEN,



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(Testimony of Henry T. Briggs)

The Witness: Well—

The Court: Wait a minute.

The Witness: I am sorry.

The Court: How far away was the car from you that was coming from the north at the time you heard the brakes screech?

The Witness: Well, I was closer to them than that then. I was, oh, I would say a hundred feet.

The Court: All right. Proceed, counsel.

Q. By Mr. Menzies: When you say you were 100 feet from the oncoming car, do you mean that was the distance between your car and the oncoming car at the time of the impact; is that right?

A. That's right. [48]

Q. Did you hear the sound? A. Yes.

Q. Did you hear any breaking of glass?

A. Well, I heard something rolling down the highway.

Q. What did it sound like?

A. Well, glass and like the inside of a grill fell out.

The Court: Now, the inside of what?

Mr. Menzies: The inside of a grill.

The Witness: Grill.

The Court: What is a grill?

The Witness: That is the front of your car.

Q. By Mr. Menzies: The front grill on an automobile, I take it? A. It is spelled g-r-i-l-l.

Q. Now, could you observe the speed of the car as it came towards you before it struck these people that were crossing the road?

A. No, I couldn't say the speed it was coming.

(Testimony of Henry T. Briggs)

Q. Well, could you tell the court whether it was coming fast or slow?

A. Well, I would say it was coming over the speed limit, anyhow.

Q. Pardon?

A. I would say it was coming over the speed limit. [49]

Q. What do you mean by "over the speed limit"?

A. Well, I don't know actually the speed, but, well, I would say—I would say 40 miles an hour, 45.

Q. What happened to the car after you saw it strike these two people?      A. It went on.

Q. Did it slow down or did it speed up?

A. Well, I didn't look back at the car. I figured the man stopped. I am figuring again.

The Court: Just go back to the accident—and don't be nervous—take all the time you want and just be quiet. Now, you were there. Listen to the question carefully and do not answer it until you thoroughly understand the question because you are under oath. Be careful and take all the time you want. Do not be nervous.

Now, Mr. Reporter, please repeat the question.

(Question read by the reporter.)

The Witness: I will have to think back now.

The Court: Take your time.

Q. By Mr. Menzies: That is, if you know.

A. Well, I am trying to think of what I was doing.

Well, I heard the brakes squeal, and when I heard the brakes squeal I didn't look around at the car any more. And then I went across the street and got a sheet from the Solano Cafe and I come back and covered the lady up and I got a [50] flashlight and started waving the



(Testimony of Henry T. Briggs)

traffic and slowing them down so they wouldn't run over the people, but I thought the man stopped.

Q. You did not see what happened to the car?

A. I didn't see what happened to the car.

Mr. Menzies: That is all. You may examine.

### Cross Examination

By Mr. Nourse:

Q. When you first noticed this other car, you say your car was about 175 feet from it?

A. When I noticed it?

Q. Yes, when you first noticed this other car.

A. Well, when I first noticed the other car, yes, that is about the right distance. I mean that is approximate.

Q. And do you remember testifying at the coroner's inquest? A. Yes, I do.

Q. That was on the 23rd of July, just three days after the accident?

Mr. Menzies: What page, Mr. Nourse?

Mr. Nourse: Page 122 it starts on.

I am reading commencing on line 15, the last part of the coroner's question. He asked about three questions once but ended up with this one: [51]

"Q. . . . Just give us a statement of what you actually saw."

Q. By Mr. Nourse: Do you remember testifying as follows:

"A. Well, I was traveling north on Highway 101, coming from San Diego, and just coming up that incline by the cafe."

I am skipping the question.

(Testimony of Henry T. Briggs)

"A. A slight incline—and I seen these people walking across the street, but I seen the one—I thought it was a lady and a dog, because the man was bending down, picking something off of the street—but he was in the third lane, I mean, the center lane. They were right at this point (indicating on diagram)."

That is "XS" on the coroner's diagram.

"A. Yes, it is. And, well, he was bending down and picking something up—and then the next thing I seen, the car—the lady was running across the street towards me, and the car was coming at me also, so the best thing for me to do was to swing to the right of the road to avoid running over the lady, and then this other car was coming toward me, and swerved on and went on, but I heard the squeal of brakes and the thud, and the two bodies were rolling towards my car."

Is that the best of your recollection as to how that thing happened? [52]                      A. Yes, it is.

Q. Is it not true, then, that when you first saw this car, when your attention was first attracted to the car and the people, the car was coming over towards the center of the road and the lady was running towards you and the car coming towards you?

A. Well, the car was traveling in the center of the road.

Q. Wasn't it coming towards you?

A. Well, when I seen the car I would say it was . . . well, there is two white lines coming down the highway, and I would say part of his left fender and wheel was over this white line.

(Testimony of Henry T. Briggs)

Q. Calling your attention to the transcript here that you saw the car, the lady rolling towards you and the car coming towards you—

A. She was rolling. He had hit them already. She was rolling.

Q. Let me read it to you again and see if this is correct. Was your memory pretty fresh at that time?

Mr. Menzies: I will object to counsel's arguing with the witness. If he seeks to ask him, your Honor, whether or not he so testified, I have no objection. But it is purely the court's function to determine whether or not this witness' memory was fresher then than it is now. [53]

The Court: I have had witnesses say they could not remember very much under certain conditions; so I assume that those conditions are not here. However, it is a perfectly proper question.

Q. By Mr. Nourse: Your memory was pretty fresh as to the accident at the time you testified at the coroner's inquest? A. Yes.

Q. Let me call your attention again to what you said there, and tell me whether or not this was a true statement of what you saw:

" . . . and then the next thing I seen, the car—the lady was running across the street toward me, and the car was coming at me also. . . ."

Is that right?

A. She was not running. She was rolling. She was rolling along the highway.

Q. ". . . so the best thing for me to do was to swing to the right of the road to avoid running over the lady, and then this other car was coming toward me. . . ."

(Testimony of Henry T. Briggs)

Now, was the other car coming towards you?

A. Well, probably in the excitement and everything I figured he was coming at me because when he hit them people and they come running at me, I just swerved off the highway.

The Court: Now, read back what the witness just said. [54] I think he does not mean what he said.

(Answer read by the reporter.)

The Court: Stop there. Who came running at you?

The Witness: What I mean to say, they were rolling because the body was rolling. I stuck my head out the window. Well, her leg was mangled and blood all over and that was a mess. So I just parked the car and run and got a sheet and covered her up.

The Court: Proceed.

Q. By Mr. Nourse: How far was the car from these people when you first saw them?

A. May I have that question again, please?

Q. How far was the other car from these people when you first noticed the car and the people?

A. Oh, I would say that the car was 20, 30 feet.

Q. Did you realize right then that the people were going to be hit?

A. Yes, I knew it in my mind they were going to be hit because I went to hit my wife and tell her about it.

Q. Did you then apply your brakes and turn to avoid them?

A. I couldn't say for that because I know I had my brakes on; and, well, it all happened so fast. I had my brakes on, and I was pulling off to the side of the road and trying to avoid running over the people because they

(Testimony of Henry T. Briggs)

were [55] rolling toward me, and I just pulled over to the side of the road.

Q. And your brakes were screaming?

A. I wasn't going that fast that my brakes would squeal.

Q. What?

A. I was not going so fast that my brakes would squeal.

Q. May I call your attention to the testimony at page 24—

Mr. Menzies: You mean 124?

Mr. Nourse: What? Page 24.

Mr. Menzies: 124?

Q. By Mr. Nourse: —page 124 of the coroner's inquest, line 22:

“Q. You know that this definite car put its brakes on, you could tell that that was a squeal from that car?

“A. Yes—and I even had my on, and I was screaming also.”

Does that refresh your recollection as to what happened at that time?

The Court: Now, read the last part of that.

Mr. Nourse: “. . . and I was screaming also.”

The Court: “I”? Was it your brakes or you personally? [56]

The Witness: I think I was screaming, too, because—well, it was just a mess to me.

The Court: That is what I wanted to clear up.

Q. By Mr. Nourse: Which was it, do you remember? Were your brakes screaming?

A. Well, I had my brakes on, but I wouldn't swear to it because I was excited and, well—

(Testimony of Henry T. Briggs)

Q. Then, after you put on your brakes, after you applied your brakes, you did hear the scream of brakes, is that right?

A. After I heard the thud, then the brakes.

Q. Yes.

A. And, well, it all just happened just all at once, like.

Q. And you could not tell where any noise came from, and it was all over in about one second?

A. I knew the car that hit the people had the brakes on when that occurred, anyhow, because, well, the thud and then the brakes, and then, well, I didn't have my brakes on until the body came rolling towards me and I just pulled off to the side of the road.

Q. I should like to read to you some more testimony from the coroner's inquest. Going on with page 123—

The Court: What was the date of that testimony, Mr. Nourse? [57]

Mr. Nourse: The date of the coroner's inquest?

The Court: Yes.

Mr. Menzies: The 23rd of July.

Mr. Nourse: The 23rd of July, three days after the occurrence of the accident.

Mr. Menzies: What page, please?

Mr. Nourse: Page 123.

"Q. Did you see the car coming prior to the accident? Did you see a car coming which you think—

"A. Yes, I seen the car coming, and it was coming at a fast pace, I would say.

"Q. You knew they were going to get hit?

A. I knew they were going to get hit, because I was just going to say to my wife, 'Look at that lady and the

(Testimony of Henry T. Briggs)

dog crossing the street, and this crazy fool coming toward them,' but I didn't—it didn't come out. At the time it was going to come out, they were coming toward me, and I was swinging to the right to avoid running over the lady.

“Q. The car coming south had two headlights, did it?

“A. Well, I was watching the people, and trying to watch the car. I didn't notice if they had—”

Q. By Mr. Nourse: Is that correct?

A. That is right.

Mr. Nourse: May I have just one moment here, your Honor? I have a partial index of this. [58]

Q. By Mr. Nourse: How fast were you traveling that night?

A. Oh, I would say about 40 miles an hour.

Q. About 40. Do you remember being questioned by Mr. Menzies here while you were at the coroner's inquest?

A. Yes, I do.

Q. And didn't you—

Mr. Menzies: What page, please?

Mr. Nourse: Page 140.

Mr. Menzies: What line?

Mr. Nourse: Well, I am trying to get it, Mr. Menzies, and I will tell you in just a moment.

Mr. Menzies: Thank you.

Mr. Nourse: Maybe I have the wrong page. I thought I had it from the index. Page 143. I was mistaken.

I will have to start on page 142, I guess, to get the sense.

(Testimony of Henry T. Briggs)

Q. Well, was there any other cars between your car and where you first saw this lady with what you thought was a dog?

"A. Well, there was one on the side of the road.

"Q. Which side of the road?

"A. The right, the right side of the road.

"Q. As you were heading north?

"A. I was heading towards Los Angeles. [59]

"Q. Were there any one . . . the west side of the road, coming towards you, besides this other car?

"A. No, there was just this—only the car that was coming towards us.

"Q. And how long—where did you stop your car, with relation to where the impact occurred?

"A. Well, as she came at me, and him, too, so fast, that by me avoiding it and pulling over, I had my brakes on at the same time, and just leaving the car right where it sat, right off the roadway."

Q. By Mr. Nourse: Is that correct?

A. That's right.

Q. Is it not a fact that the minute you saw this car you knew an accident was going to occur? A. Yes.

Q. And when you knew it was going to occur you immediately applied your brakes and turned to your right?

A. No, I didn't apply my brakes until it all happened. Well, when I looked up it was just happening.

Q. Then you applied your brakes?

A. I put my brakes on. I had my brakes on as I was turning.



(Testimony of Henry T. Briggs)

Q. Then as the car passed you, you heard the scream of brakes and that brought you to the belief that it was going to stop? [60]

A. Yes, I figured the car stopped right where it hit the people.

The Court: Did you put on your emergency brake or the regular brake?

The Witness: When I parked? I wouldn't remember that, but I think I even left the motor running and the brake on.

Mr. Nourse: That is all.

The Court: Is there anything further? Does any of the other attorneys have any questions?

Mr. Luce: I should like to ask a question or two, your Honor.

The Court: All right.

### Cross Examination

By Mr. Luce:

Q. Mr. Briggs— A. Yes, sir.

Q. —at about that point in Solano Beach there are little stores and cafes strung along on either side of that highway? A. Yes, there is.

Q. There was no marked crosswalk at the point where these persons were crossing, was there?

A. No.

Q. There was no marked crosswalk anywhere close to them, was there? [61]

A. Well, unless there is one down further by the plaza.

Q. Well, the plaza would be how far away?

A. Oh, about two blocks.

(Testimony of Henry T. Briggs)

Q. Well, there was no marked crosswalk within two blocks of the scene of the accident, was there?

A. No.

Q. There was no street-crossing at the place where the accident occurred, was there?

A. I couldn't say as to that. There is one back by the plaza. There is a street.

Q. Well, you did not see any street-crossing there?

A. No.

Q. In other words, this was not at a street intersection where the accident occurred, was it?

A. No. There was a cafe and a line of stores across the street.

Q. There was no opening of a street going out on either side? A. No.

Q. At or about the point of the accident?

A. No.

Q. Mr. Briggs, you saw this approaching car prior to the accident for only an instant, did you not?

A. Well, I see the car coming and the people there. I [62] knew that they were going to get hit.

Q. You did not see that approaching car travel for more than 75 feet before the impact, did you?

A. Give me that question again, please.

The Court: Mr. Reporter, repeat the question.

(Question read by the reporter.)

The Witness: Well, I wouldn't say.

Q. By Mr. Luce: Will you tell me how far you did see it travel prior to the impact?

A. I am getting all confused now.

The Court: Take you time, Mr. Briggs.

Mr. Luce: May I clear that up, perhaps, for you?

(Testimony of Henry T. Briggs)

Q. You saw this approaching car before the impact? And by "the impact" I mean the collision with the pedestrians.

A. I would say that the car was coming at the people before they were hit, oh, 20 to 25 feet before they were hit.

Q. That is, you saw this car—

A. I see the car, and I seen the people; and the people were 25 feet from the car and the car was coming at them.

Q. That is, when you first saw this car it was about 25 feet from the people?

A. Yes. No, I seen the lights coming down the highway; and, well, naturally, you don't pay much attention, but [63] you know there is a car coming. I knew there was a car coming.

Q. You only had an opportunity to see the approaching car or observe it a distance of about 25 feet prior to the time it collided with the pedestrians?

A. I was watching these people that were crossing the street, yes, and watching the car, too.

Q. That is substantially correct, is it not: that you saw it travel about 25 feet? A. Yes.

Q. While you were observing it before the accident?

A. Yes.

Q. Are you willing to tell us here under oath that you can judge the speed of that car when you saw it travel only 25 feet at night approaching you?

A. Well, if I did give any statement about speed, it was just approximately, anyhow. But, well, it just seems like when you look at a car coming at you and if it is coming at any speed, you can see the two headlights bouncing.

(Testimony of Henry T. Briggs)

Well, with me, being a mechanic, I judge a lot of things along the highway; and I like to take interest in cars and how they drive and how it happens. And I like to figure out those things.

Well, I know if I drive my car fast and it's coming at me, looking at it straight on, I can see—you have seen a [64] bull running, how they—

Q. Mr. Briggs, you have no way of estimating the speed of that car in the distance that you saw it travel, have you?      A. No, I haven't because—

Mr. Luce: That is all.

The Court: Anything further?

Mr. Nourse: I should like to ask something. I overlooked something I should like to ask the witness.

Redirect Examination

By Mr. Nourse:

Q. Would you look at this statement and see if you remember making this written statement of the accident?

A. Yes, I do.

Q. On December 24 of 1946?

A. Yes. I just got in to Detroit Saturday at midnight, and I didn't even have time to have my breakfast, didn't brush my teeth, and there was a knock on the door and there was an investigator. I was still sleepy. I had driven 2900 miles, and I had about four hours' sleep, and I made this statement.

Q. This is your signature?      A. That is.

Q. On both of these pages?      A. That is.

Q. May I read you part of it, please? [65]

A. Is this water good to drink?

(Testimony of Henry T. Briggs)

Mr. Nourse: I think that is what it is there for.

"I saw the headlights of a southbound automobile which was straddling the line between the west and center lanes of the highway. This car hit the two people, throwing the man to the center of the road and the lady over into the east lane in which he was proceeding north.

"I immediately swerved to the right and went off the shoulder of the road on the east side, and my car stopped, facing east. My car did not touch the lady as she rolled toward us. The southbound car slowed down at the corner about one and a half blocks to the south and then he kept on going. . . ."

Skipping the description of the injuries—well, I will read it all.

"The man was killed instantly, and the lady lived until the following morning. At the time of the impact I would say the southbound car was straddling the line dividing the west and center lanes of the highway.

"However, immediately after the impact this car seemed to come over towards the center of the road, but I cannot say how far as it happened so fast, and he went on. I could not estimate his speed. I only saw the headlight coming towards me, but I do know that one of the reasons I swerved right was because the southbound car seemed to be [66] coming towards us after the impact with the man and lady.

"It was after George White had pleaded guilty in court that I spoke to him, and he told me that he didn't know what had happened, as he was asleep at the wheel.

(Testimony of Henry T. Briggs)

"I have read the above statement of two pages, and it is true to my knowledge and belief.

"Henry T. Briggs."

Q. By Mr. Nourse: Was that statement made by you?      A. That's right.

Q. Is that correct?

A. Well, he only asked me several questions, and I can't figure out how he got three pages out of it.

Q. It is only two. You read it at the time?

A. I did. My wife read it also. This fellow visited me, and he only asked me a few questions, and he got out two pages.

Q. Did he get anything wrong?

A. No, but he kept adding if's and and's.

Mr. Nourse: And the it's and an's were right. Maybe he had a crystal ball.

That is all.

The Court: Any further questions, gentlemen?

Mr. Lonergan: No questions.

The Court: Mr. Luce?

Mr. Luce: No. [67]

The Court: Any questions, Mr. Menzies?

Mr. Menzies: No questions.

The Court: That is all. Call your next witness.

(Witness excused.)

Mr. Menzies: Mr. Hawkins.

LONNIE LEE HAWKINS,

called as a witness by and in behalf of the defendant Home Indemnity Company, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Lonnie Lee Hawkins.

The Clerk: How do you spell your first name?

The Witness: L-o-n-n-i-e, Lee, H-a-w-k-i-n-s.

Direct Examination

By Mr. Menzies:

Q. Mr. Hawkins, where do you reside?

A. I have an apartment in the back of my cafe, the Solano Cafe in Solano Beach, California.

Q. Where is that Solano Cafe located with relation to Highway 101?

A. It is on the west side of the highway about a half a block from the bank building north.

Q. About how far?

A. About a half a block from the bank building north, the Bank of America. [68]

Q. Directing your attention to on or about the 20th day of July, 1946, did you hear or see anything unusual on that day?

A. Well, the wife and I had just got back from going and getting our children from the movies in Encinitas.

Q. What time was that?

A. Well, we got back—it must have been about 10:00 o'clock, and I begin getting ready for the next day, that is, cutting my meats and getting my roasts wrapped and tied, and so forth, for the next day.

Q. Where were you at that time?

A. I was in the kitchen of my cafe.

(Testimony of Lonnie Lee Hawkins)

Q. Is there anything that divides the kitchen in your cafe from the portion in which you serve the meals?

A. There is a back bar about five feet high and a counter.

Q. Was there anyone else there in the cafe with you at that time?           A. My wife was there.

Q. Do you recall what time of day or night it was?

A. Yes. I had just looked at the clock just before going out to the ice box to get a quarter of beef to bring in, and it was 25 minutes to 11:00 o'clock. And I know because I was just wondering if I would have time—we close at 11:00 o'clock—and I was wondering if I would have time [69] to get my meat all put up for the next day by closing time.

Q. What happened?

A. Well, I heard an awful screeching of brakes and an awful impact. At the first screeching of the brakes I looked up, and there was nothing to obstruct the view from where I was through the front. The front of the cafe is glass, which is about 16 feet wide, and as I looked up I see these cars coming past the cafe, that is, I seen just a blur of cars and people.

I knew there had been a wreck in front, but I thought at the time a couple of cars had run together.

I dropped what I was doing and ran out the front, and I was on the sidewalk and looked in both directions. I ran and I seen these people across the street, and I ran across the street to where they were. But by the time I got to the center lane there was a car that had pulled over, had swerved over to keep from hitting these people, and he had just come to a stop.



(Testimony of Lonnie Lee Hawkins)

Q. Do you know who was driving that car?

A. No, sir, I don't.

Q. Did you see him in the court room today?

A. I don't know who was driving that car at the time. I couldn't swear to it.

Someone said, "Stop that car." I looked to the right, and the car at that time was about in the center lane but it [70] was swerving over to the right side of the road, and I thought it was stopping. It was going awfully slow, slowing down awfully fast, rather.

The Court: In what direction was that car going?

The Witness: That car was going south, sir.

The Court: All right.

The Witness: And it was just about even with the Bank of America Building at that time and was almost stopped, and I said—

Mr. Nourse: Just please tell what you saw, not what you said.

The Witness: Well, someone told me to stop the car and I told him that it had stopped.

Mr. Nourse: I object to that and ask it go out as hearsay.

The Court: Just what you did, what you saw.

The Witness: Then I ran over to where the bodies were because I seen another car coming north. I could see the man. His head was laying just about even with the white line, the extreme eastern white line there, you know, right on the shoulder. And I was afraid this other car was going to run over him. So I ran out and was directing this other car that was going north away from the bodies, and when I looked up then, when I paid attention to see whether this car had stopped for sure— [71]

(Testimony of Lonnie Lee Hawkins)

The Court: "This car?" Which one?

The Witness: The car that I presumed had hit them.

The Court: Strike that out. Just tell us what you saw. The one that was going south?

The Witness: Well, I thought that was the car that was stopping, sir.

The Court: All right, go ahead.

The Witness: But after this car that was coming north, after it had already passed I seen that this car that was going south had not stopped as I thought it had in the first place.

Q. By Mr. Menzies: Did you see what it did?

A. No, sir, I didn't.

Q. What did the car do, that is, the car that was going south, that indicated to you that it was stopping?

A. Well, as I first noticed it, it was in about the center lane and it was swerving a little and pulling over to the right and slowing down.

Q. You mean that it was swerving from side to side? Or was it going to one side only?

A. Well, it looked as though he was trying to get his car under control again. It looked as though—

Mr. Nourse: I ask that be stricken out as a conclusion of the witness. He can tell which way it was swerving or what it was.

The Court: There is no jury. I think I understand, [72] counsel, what he means. Go ahead.

Q. By Mr. Menzies: Do you know whether that car stopped or not? A. No, sir, I don't.

Q. Did you see it when it pulled away?

A. No, sir.

(Testimony of Lonnie Lee Hawkins)

Q. Do you know what color that car was?

A. At the time I thought it was maroon.

Q. But you do not know what it was?

A. I don't know for sure, no, sir.

Q. Now, which did you hear first, Mr. Hawkins, when you were back there in the back part of your restaurant? Did you hear a screech of the brakes or the impact first?

A. I would say I heard the screech of the brakes just a moment before the impact and also the screaming of someone just about the time of the brakes screeching. Someone screamed.

Q. How far were you from the front of your store? Can you tell us approximately?

A. About 25 or 30 feet.

Q. Pardon?

A. About 25 or 30 feet from the door of my cafe that leads into the cafe back to the kitchen to where I was. It is about 25 or 30 feet.

Q. Was the door open in the cafe? Or was it closed? [73]

A. It was open.

Q. How far from the front of your cafe to the first white line in the pavement there, do you know?

A. Well, there is a sidewalk about 12 feet wide, and there is a shoulder of the road which would be about another 10 feet. It would be about 22 to 25 feet.

Q. Pardon?

A. It would be from 22 to 25 feet from the door of the cafe to the first white line.

Q. Did you examine the highway there that night to determine if you could where the point of impact was?

A. Yes, sir, we did.

(Testimony of Lonnie Lee Hawkins)

Q. Can you tell me about how far it was from where you determine the point of impact to be to where you were standing at the time you heard the person screaming and the brakes of the car screeching?

Mr. Nourse: Your Honor, I don't think that is a proper question, if we get the conclusion of the witness as to where the point of impact was, without giving us or the court any knowledge as to what marks he saw or where these marks were or from what point he is testifying to now.

The Court: I think this witness can fix the place he saw the marks, counsel.

Mr. Nourse: Yes, if he can tell us what he saw.

Q. By Mr. Menzies: What did you see on the highway, [74] Mr. Hawkins, that indicated to you where the point of impact was?

A. It was near the center of the highway, and there was an awful lot of broken glass there. Glass was scattered; small particles were scattered for quite a distance on south. Right at the north corner of the front of my cafe is a lamp post. At the time the light was out. It wasn't burning, and it was just about due east of that lamp post out about 15 feet out in the highway. I would say, is where the point of this impact was, I believe.

Q. When you say "out into the highway 15 feet," from what point do you mean that?

A. From the curbing.

Q. From the curbing? A. Yes, sir.

Q. How far would you say that was from where you were standing in your cafe there behind the back bar?

A. I would say about 35 feet, 40.

(Testimony of Lonnie Lee Hawkins)

Q. Do you know how far the bodies were from the point of impact when you first saw them, just approximately?

A. Well, I didn't step it off; but I would say they were between 60 and 80 feet.

Mr. Menzies: That is all. Thank you, sir.

The Court: Cross examine. [75]

Cross Examination

By Mr. Nourse:

Q. You say you were in the kitchen about 25 feet from your front door, is that right?

A. Yes, sir.

Q. Then there is a sidewalk that is about 12 feet?

A. Yes, sir.

Q. The shoulder of the road is 15 feet there, isn't it, to the first paved lane of traffic?

A. No, sir. I don't think it is quite that far.

Q. Well, what is your best estimate?

A. Not over 10 feet at most.

Q. Now, there is 12 and 5—37—and 10, 47. Was it when you got over at the bodies that you turned and saw the maroon car nearly at a stop?

A. Well, sir, I glanced toward the car that I thought had hit them and was slowing down. I glanced at that car as I was crossing the street going to the bodies.

Q. You were at about the center of the street then?

A. I was at about the center of the street.

Q. Well, the first lane is how wide? You got to the shoulder now and were 47 feet from where you were. Then you had first crossed which? The northbound lane of traffic, the northbound traffic lane?

A. No. I would first cross the southbound traffic [76]

(Testimony of Lonnie Lee Hawkins)

Q. You were on the ocean side?

A. Yes, sir, on the west side.

Q. Your cafe faces north? A. Faces east.

Q. Faces east, rather. Then you came out and you crossed the sidewalk, the shoulder, the first traffic lane and got about to the center of the street when you turned and saw this car to the south of you?

A. I believe that is correct, sir.

Q. It was then about in front of the bank building?

A. No, sir, it was not in front of the bank building at that time.

Q. Where was it then?

A. Well, it was, I would say, maybe 150 feet from where I was standing at the time.

Q. 150 feet from where you were standing. It was then weaving in the highway towards the right and going about what speed?

A. Well, they were slowing up all the time. All the time they were trying to get the car stopped, see.

Q. Well, how long did you look at them, glances at them as you were crossing the road there?

A. I only took a quick glance, and then I glanced back to where the bodies were and proceeded on across the street to where the bodies were. [77]

Q. And at that glance you could see that he was attempting to slow down, is that it? A. Yes, sir.

Q. That is, you drew that conclusion?

A. Yes, sir.

Q. How many miles an hour do you think you traveled going from your kitchen out there?

A. About seven.

(Testimony of Lonnie Lee Hawkins)

Q. About seven. And you traveled pretty near 75 feet to the center of the road, didn't you, where you made this glance to the south?

A. No, I didn't travel 75 feet.

Q. What?

A. I didn't travel 75 feet to the middle of the road.

Q. I will give it to you again. 25 feet to your front door, 12 feet across the sidewalk is 37, 10 feet across the shoulder is 47, 10 feet across the first traffic lane is 57, and however much the distance to the center of the highway, it would be  $7\frac{1}{2}$  feet more.

A. I might not have been directly in the middle of the road. I might have been five feet this way.

Q. Or five feet the other way. So I said about 60 feet.

A. Approximately, yes, sir.

Q. Your best memory is that when you reached the other [78] side of the road this northbound car had just come to a stop?

A. It had already come to a stop, yes, sir.

Q. The man was getting out of it, wasn't he?

A. I believe he was turning the handle on his car and getting out, yes, sir.

Mr. Nourse: I think that is all.

The Court: Any questions?

Mr. Luce: No questions on our part.

The Court: Any questions?

Mr. Lonergan: No questions.

The Court: That is all, thank you.

(Witness excused.)

Mr. Menzies: Mrs. Hawkins, will you take the stand, please?

## BEATRICE HAWKINS,

called as a witness by and on behalf of the defendant Home Indemnity Company, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Beatrice Hawkins.

The Clerk: Will you take the stand, please?

## Direct Examination

By Mr. Menzies:

Q. Mrs. Hawkins, you are the wife of Mr. Hawkins who just preceded you on the witness stand? [79]

A. That is right.

Q. Directing your attention to on or about the 20th day of July, 1946, did you hear anything unusual that day?

A. Yes, I did.

Q. What time of the day or night was it?

A. Well, 25 to 11:00.

Q. Beg your pardon?

A. 22 until 11:00.

Q. And what did you hear?

A. Well, I heard the brakes and the scream and the hits, the noise.

Q. The crash?

A. Yes.

Q. Can you describe that crash and sound?

A. Well, to me it seemed more like two impacts.

Q. Sorry, I can't hear you.

A. I think it was two impacts.

Q. Two impacts?

A. That is what it sounded to me like.

Q. Were those sounds loud or dull?

A. Yes, quite loud.

Q. Which did you hear first?

A. Well, that I wouldn't say. I don't remember.



Q. Was it the screeching of the brakes, the scream or the thud? [80]

A. Well, it seemed to be more the brakes and the screams at the same time.

Q. The brakes and the scream at the same time, and then the thud? A. That is the way it seemed.

Q. Did you see what happened?

A. Well, no, I didn't see it as it happened.

Q. Where were you at the time that you heard the screech of the brakes, the scream and then the thuds?

A. I was sitting at the counter.

Q. In your restaurant? A. Cafe.

Q. There in Solano Beach? A. That is right.

Q. What did you see after you heard the thuds?

A. Well, I looked around and I saw the car stopping on the north side, I mean the east side of the highway, and the bodies flying through the air; and they looked to me that they were going to hit this car.

Q. That is, the car coming north?

A. That's right.

Q. Did you see what became of the car going south?

A. I don't remember seeing that car at all.

Mr. Menzies: That is all. You may examine. [81]

### Cross Examination

By Mr. Nourse:

Q. When you heard the scream you looked up?

A. Yes.

Q. You saw two bodies going through the air?

A. Yes. I think that is the first thing I saw.

Q. At the same time you heard the screech of the brakes, didn't you?

A. I heard the screech and the screams.

(Testimony of Beatrice Hawkins)

The Court: No, she does not understand the question.  
Repeat the question, Mr. Reporter.

Listen carefully to the question.

(Question read by the reporter.)

The Witness: The question isn't clear.

The Court: All right, proceed.

The Witness: No, I had already heard those before I saw the body. Does that answer it.

Q. By Mr. Nourse: You heard the screech?

A. The scream.

Q. When did you look up? When you heard the screech of brakes or when you heard the scream?

A. Well, they seemed to be at the same time; so that is when I looked at.

Q. They seemed to be at the same time, and you looked up? [82] A. That's right.

Q. At the same time you looked up and saw the bodies in the air, you saw the northbound car, didn't you?

A. Yes, sir.

Q. It was coming to a sudden stop when you saw it?

A. It was stopping, yes, sir.

Mr. Nourse: That is all.

Mr. Lonergan: No questions.

The Court: Mr. Luce?

Mr. Luce: No questions.

Mr. Menzies: No further questions.

The Court: That is all.

(Witness excused.)

The Court: That is all.

Mr. Luce: Your Honor, before we take an adjournment may I present a very brief matter?

My client, Mr. White, has been brought up here as a witness under a writ of this court. He has been incarcerated in the industrial road camp in San Diego, not in the county jail, but in the road camp under the sentence of the court. When he was brought up here by the officer, the officer was instructed by the superintendent of the road camp if the case lasted overnight to lock Mr. White up in the county jail.

I think that he is under the jurisdiction and custody of this court, being brought here on a writ, and it would be [83] unfair and unduly harsh to lock him up in the county jail tonight.

The officer tells me he is perfectly willing to keep him in his room at the hotel, and it would seem to me that the court might have the power to direct that and that that would be the only fair thing to do, if he be kept by the officer in the room at the hotel rather than take him to the county jail.

The Court: What is the sentence in the road camp?

Mr. Luce: The term of it, your Honor? I think it was a year in the road camp but not in the county jail.

The Court: How long has he served?

Mr. Luce: A few days short of five months.

He is a man of prominence, as your Honor probably knows; and there is no danger of his running away or disappearing, and the officer is with him all the time, anyhow.

The Court: Is the officer here?

Mr. Luce: Yes, he is right here.

The Court: Step up, officer, and Mr. White. Both of you come up here.

(The defendant White and Officer D. S. Williams approach the bench.)

The Court: Swear the officer, Mr. Cross. [84]

D. S. WILLIAMS,

called as a witness, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: D. S. Williams.

The Court: What is your occupation?

The Witness: I am a guard at the industrial road camp, sir.

The Court: Under the State?

The Witness: Under the County.

The Court: Under the County of San Diego?

The Witness: Yes, sir.

The Court: Has Mr. George White here been placed in your charge for the purpose of appearing in this trial?

The Witness: That is true.

The Court: Have you known him for some time, or have you observed him in camp?

The Witness: I have known him ever since he has been in camp.

The Court: You have charge of the camp?

The Witness: I don't have charge of the camp. I have charge of the prisoners that are in the plant.

The Court: You have seen him frequently?

The Witness: Yes.

The Court: If I permit him to remain with you overnight [85] to report here tomorrow morning at 10:00 o'clock, will you take the responsibility that he is here at 10:00 o'clock in the morning?

The Witness: Yes, sir.

(Testimony of D. S. Williams)

The Court: Mr. White, you have heard the questions of the officer here.

I shall permit you to remain with the officer tonight if you stay in his custody and report here tomorrow at 10:00 o'clock.

The Defendant White: Yes, your Honor.

The Court: So ordered.

The Defendant White: Thank you very much.

The Court: Court is adjourned until 10:00 o'clock in the morning.

Mr. Menzies: Your Honor, I have one witness here. Perhaps counsel would stipulate. He is the court reporter that took Mr. White's statement. I had to bring him here in view of the answer.

I have the statement here that is certified by the court reporter.

Mr. Nourse: I said in my answer to the interrogatories, your Honor, that if they brought that I would stipulate it was correct.

The Court: That settles it.

Mr. Menzies: Very well. I will offer it in evidence [86] as exhibit B.

Mr. Nourse: It is already in evidence. I offered it myself.

Mr. Menzies: All right. 10:00 o'clock.

Mr. Nourse: Your Honor, I have a trial brief here that I prepared. It may be of assistance to your Honor.

The Court: Give it to the clerk.

(Whereupon, at 4:45 o'clock p. m. an adjournment was taken until 10:00 o'clock a. m., January 21, 1947.) [87]

Los Angeles, California, Tuesday, January 21, 1947,  
10:00 A. M.

The Clerk: No. 5729-O'C, Standard Accident Insurance Company of Detroit, a corporation, v. Home Indemnity Company of New York, and others, for further court trial.

Mr. Menzies: Ready.

Mr. Nourse: Ready.

The Court: Proceed, gentlemen.

Mr. Menzies: May it please the court: Mr. Nourse called my attention to the fact that I neglected to offer in evidence yesterday the two policies, that is, the one of the Standard Accident Insurance Company and the one of the Home Indemnity Company. At this time I will offer in evidence both of those policies and ask that the Standard Accident policy be marked as Exhibit B and the Home policy as Exhibit C in evidence.

Mr. Nourse: May I suggest, your Honor, to keep from encumbering the record, that counsel stipulate that the policy annexed to the complaint and marked as Exhibit A be deemed in evidence as Defendants' Exhibit B, and that the policy annexed to the Home's answer and marked as Exhibit A be deemed in evidence and be marked as Defendants' Exhibit C.

Mr. Menzies: That is satisfactory.

Mr. Nourse: That will obviate any possible duplication.

Mr. Luce: That is satisfactory.

Mr. Lonergan: That is satisfactory. [90]

The Court: So ordered.

(The documents referred to were marked Defendants' Exhibit B and C. and were received in evidence.)

Mr. Menzies: There is one other item. Yesterday I offered the Home's interrogatories to the Standard Accident in evidence. I believe the ruling of the court was that those interrogatories were rejected. I will renew my offer now for the reason that I believe that was an inadvertent mistake. The answers to those interrogatories are in evidence and are marked Exhibit A, but the interrogatories themselves have not been received in evidence.

The Court: If that is the record, it is so ordered.

Mr. Menzies: And may those interrogatories then be marked as Exhibit D?

Mr. Nourse: Why don't you have them a part of Exhibit A.

Mr. Menzies: A part of Exhibit A is satisfactory.

The Court: So understood.

Mr. Lonergan: Your Honor please, I believe we objected to the introduction of the answers.

The Court: They are not binding on your clients.

Mr. Nourse: That is right, your Honor.

The Court: Subject to the objection, it will be received.

(Thereupon the interrogatories referred to were received in evidence and marked as a part of Defendants' Exhibit A.) [91]

Mr. Menzies: Mr. Cassin, will you take the stand, please?

## FRANCIS WILDERN CASSIN,

called as a witness by and on behalf of the defendant Home Indemnity Company of New York, having been first duly sworn, was examined and testified as follows:

## Direct Examination

The Clerk: Will you state your name, please?

The Witness: Francis Wildern Cassin.

By Mr. Menzies:

Q. What is your business or occupation, Mr. Cassin?

A. Motorcycle officer, San Diego Police Department.

Q. Do you know the defendant, George White, in this case?

A. I have met up with him, yes, sir.

Q. Do you see him here in the court room today?

A. I do.

Q. Directing your attention to on or about the 20th day of July, 1946, did you see the defendant, George White, on that day?

A. I did.

Q. At or about what time?

A. Approximately 10:45, 10:50 of the evening of July 20, 1946.

Q. Whereabouts did you see the defendant, George White, at that time? [92]

A. Approximately half a mile south of Balboa on U. S. 101.

Q. Was he driving a car at that time?

A. Yes, sir.

Q. What kind of a car was it?

A. A 1942 Lincoln Zephyr.

Q. Do you recall the color of that car?

A. Gunmetal.



(Testimony of Francis Wildern Cassin)

Q. Just tell us what if anything first attracted your attention to this 1942 Lincoln Zephyr.

A. Prior to meeting up with his car an all-car pickup had come in on a hit-and-run from Solano Beach. I was in the north beach area and cut across Garnet Avenue to U. S. 101 and was sitting at the intersection watching traffic. I noticed a car coming south, traveling south on U. S. 101. It come out of Rose Canyon, and it was a Willys sedan, with a headlight out, and that car turned into the General Petroleum station there at the corner of Balboa and U. S. 101. A minute or two later a car being driven on the inside lane towards San Diego south come out of the canyon. I noticed this was a Lincoln sedan. The left front headlight was out. I kicked over my motorcycle, apprehended the car, and stopped the car approximately half a mile south of that intersection.

Q. At the time you first saw the car you described as the 1942 Lincoln Zephyr, can you tell me the approximate speed [93] it was traveling?

A. I would say approximately 45 to 50 miles an hour; nothing unusual about his speed.

Q. What occurred when you stopped the car about a half mile south of Rose Canyon?

A. That is after the car stopped?

Q. Yes, sir.

A. I walked up to the driver's side and the driver asked me what I was stopping him for. I told him he had damage on the front end of his car, that I would like to see it. He had no objections, and I went up to the front of the car and noticed that the left front headlight was dented in. I came back to the car and had the driver

(Testimony of Francis Wildern Cassin)

turn off the ignition. At that time I asked the driver for his operator's license. He stepped out of the car, handing me his operator's license. I asked him how far down the highway he had come. He said, "From Los Angeles." I asked him if he had made any stops on the way down, and he said, "Yes, at the Del Mar Hotel."

I asked him how long ago that had been. He said, "Approximately 20 or 25 minutes ago."

So I went up and looked at the front end of the car again. All I had was my flashlight. I examined the evidence and told Mr. White, the driver, that there was sufficient evidence on the front of his car to be taken in. I asked him if he had [94] any objections, and he said, "No." And we proceeded from there to the police station.

Q. Did you follow him with your motorcycle?

A. Yes, sir, down to just before we got to Market Street. Then I led the way to make a U-turn in front of the police station.

Q. After you got to the police station, what occurred?

A. Well, I was leading the way, made a U-turn, and just as I approached for the U-turn, Sergeant Christian had just ridden up on his motorcycle and was racking it there in front of the police station. I called to Chris and told him I had the car. We swung around. I racked my motorcycle. Mr. White parked his car on the east side of the street, headed north. Mr. White got out of the car. Chris, Sergeant Christian, came back, went to the car and looked at the damage on the front end of the car and turned and told me to take the driver inside.

(Testimony of Francis Wildern Cassin)

Q. Did Mr. White at any time between the time you stopped him about a half mile south of Rose Canyon examine the front end of the car?

A. Well, Mr. White was there when I examined the car.

Q. Did he get out of the car when you first stopped him?

A. Yes, sir, when he gave me his identification, he stepped out of the car. [95]

Q. Did he get up and look at the car?

A. He was up to the front end of the car with me, yes, sir.

Q. And when you got to the police station and Sergeant Christian was there, did all three of you, that is, Sergeant Christian, yourself and Mr. White, examine the front end of the car?

A. No, sir. I stood back. The sergeant looked at it and turned around and told me to take the driver inside.

Q. Where was Mr. White at that time?

A. He had gotten out of his car and was standing there.

Q. Whereabouts with relation to the left front fender of the car, if you recall?

A. That I couldn't say. He just stepped out of his car.

Q. Then did you and Mr. White go into the police station? A. Yes, sir.

Q. Did you have a conversation there with him inside the police station? A. Yes, sir.

Q. What occurred at that time?

A. Well, prior to that, when I asked Mr. White where the damage had occurred, he had stated it was at the

(Testimony of Francis Wildern Cassin)

Santa Anita race track that day, and as we went into the police station, Mr. White asked me if I had any objection to his using [96] the phone. I told him, "No, not at all."

We went into the traffic bureau and Mr. White dialed a number, and talked, and hung up. And we were there in the police station, and Mr. White stated, "I know that this damage had been done at the Santa Anita race track, and it was a case of having a parking space large enough, for, say, 10,000 cars, and trying to get 25,000 cars in the parking space."

Q. Then what happened?

A. Well, Mr. White was anxious to get going up to the Grant Hotel, smoked a few cigarettes, went back out into the south entrance of the police station, and about that time Officers Hake and McCreary come rolling in.

Q. I didn't hear you.

A. I say about that time Officers Hake and McCreary come rolling in.

Q. Those two officers were from the California Highway Patrol, were they not?      A. Yes, sir.

Q. What occurred then, when Officers Hake and McCreary arrived?

A. Well, they were driving south on U. S. 101, and made a left turn at Market, apparently to go in the front entrance of the police station, and we waited a minute or so, and they swung off of Harbor Drive and they pulled in, parked north of the motorcycles, got out of the car and came back. [97]

Officer Hake was driving, was on the traffic lane. Officer McCreary come down the sidewalk, and Officer Hake went back to the car, and as he was walking back, he said, "That is the car," and reached in his pocket and

(Testimony of Francis Wildern Cassin)

went up to the car, and after that I don't know. His back was to me. I don't know if he fitted in any of the pieces, or exactly what he did do.

Q. Were there any pictures of the car taken there, between the time when you arrived with Mr. White?

A. Yes, sir, there were pictures taken at the police station.

Q. Where was Mr. White when those pictures were being taken, do you know?

A. He was standing right alongside of me in the archway of the entrance of the police station.

Q. I will show you here a photograph and ask you to examine it and tell me whether or not that is a fair representation of the front end of the Lincoln Zephyr automobile that you have described here in your testimony

A. Yes, sir, that is the car.

Mr. Menzies: I will offer this photograph in evidence and ask that it be marked Exhibit E,—is that right?

The Clerk: D.

Mr. Menzies: —as Exhibit D.

The Clerk: Admitted, your Honor. [98]

The Court: Yes.

The Clerk: Defendants' Exhibit D for the Home Indemnity Company in evidence.

(The document referred to was marked Defendant Home Indemnity Company Exhibit D, and was received in evidence.)

Q. By Mr. Menzies: I show you here another photograph and ask you to examine it and tell me whether or not that is a fair representation of that Lincoln Zephyr that Mr. White was driving that evening.

(Testimony of Francis Wildern Cassin)

Mr. Nourse: So far as the plaintiff is concerned, all of these photographs, and we have examined them, may be received in evidence as a part of the offer.

The Court: Mr. Luce, what is your position?

Mr. Luce: We have no objection to their being received.

The Court: Mr. Lonergan?

Mr. Lonergan: Your Honor, I would like to have them briefly identified.

The Court: Yes.

Mr. Nourse: You might identify as to when they were taken.

Mr. Menzies: These were taken, Mr. Nourse, by Mr. Harper several days after the accident. The exact day I do not know.

We will offer this photograph, which is a full-length side view of the left side of the car, and ask that it be [99] marked as Exhibit E.

The Clerk: Defendant Home Indemnity Company's Exhibit E in evidence.

(The document referred to was marked Defendant Home Indemnity Company's Exhibit E, and was received in evidence.)

Q. By Mr. Menzies: I show you here a full length view of the right-hand side of that Zephyr, and ask you if that is a fair representation of that automobile at the time you first saw it.

A. I didn't get on that side at all.

Mr. Menzies: You didn't get on the right side. Do you have any objection to that?

Mr. Nourse: No.

(Testimony of Francis Wildern Cassin)

Mr. Menzies: We will connect it up with other witnesses. That is the right-hand side.

The Clerk: That will be Defendant Home Indemnity Company's Exhibit F in evidence.

(The document referred to was marked Defendant Home Indemnity Company's Exhibit F, and was received in evidence.)

Q. By Mr. Menzies: I show you a rear view of the car, with the license plate, and ask you if that is a fair representation of the rear of the car at the time you first saw it. A. Yes, sir. [100]

Mr. Menzies: We will offer that in evidence.

The Clerk: That will be Defendant Home Indemnity Company's Exhibit G in evidence.

(The document referred to was marked Defendant Home Indemnity Company's Exhibit G, and was received in evidence.)

Q. By Mr. Menzies: I show you a close-up of the left front fender of that same Lincoln Zephyr, and ask you to examine it and tell me whether or not that is a fair representation of the fender. A. Not the light.

Q. Not the light. What difference is there in the light?

A. When I saw the light, the reflector was still in it, and there was a piece of a bulb.

Q. Inside? A. Yes, sir.

Mr. Nourse: You mean the bulb itself was broken so there was nothing to light up there?

The Witness: Yes, sir, and the piece. The bulb was still in there.

(Testimony of Francis Wildern Cassin)

Mr. Menzies: We will offer this picture in evidence as Defendant's Exhibit H.

The Clerk: Defendant's Exhibit H for the Home Indemnity Company in evidence. [101]

(The document referred to was marked Defendant Home Indemnity Company's Exhibit H, and was received in evidence.)

Q. By Mr. Menzies: I show you here another photograph, showing the upper portion of the left front fender of that Lincoln Zephyr, and ask you to examine it and tell me whether or not that is a fair representation of the condition of that fender. A. Yes, sir.

Mr. Menzies: We will offer this in evidence.

The Clerk: Defendant Home Indemnity Company's Exhibit I, in evidence.

(The document referred to was marked Defendant Home Indemnity Company's Exhibit I, and was received in evidence.)

Q. By Mr. Menzies: I show you here another photograph of the left side of the hood of that Lincoln Zephyr, and ask you whether or not that is a fair representation of a portion of the hood, showing some dents, at the time you first saw it.

A. I couldn't say to that. I know there was a dent on the hood.

Q. But you don't identify it from that picture?

A. No, sir.

Q. Very well. Is the same true of the other view here, showing a portion of the hood? [102]

A. Yes, sir.



(Testimony of Francis Wildern Cassin)

The Court: I notice, Mr. Menzies, that in Defendant's Exhibit I there is a note, "Textile scratches," with an arrow. Is that a part of the exhibit?

Mr. Menzies: I will connect that up with the witness who took the pictures and who made the examination.

You may examine.

### Cross Examination

By Mr. Nourse:

Q. Officer, did Mr. White appear nervous when you spoke to him? A. No, sir.

Q. Perfectly sober? A. Apparently, yes, sir.

Q. Very gentlemanly? A. Yes, sir.

Q. He co-operated with you in every way?

A. Yes, sir.

Q. Now, are you sure that he got out of the car at the place where you first stopped him? A. Positive.

Q. Isn't it a fact that you went up to him, and he sat there in the car and he said, in substance, "Why are you stopping me? I haven't been speeding"?

A. I don't recall the speeding part. He did ask me why [103] I was stopping him.

Q. Didn't you then walk to the front of the car and look at it, and explain to him that you had an order to stop cars that had been in an accident, and his car looked suspicious?

A. That was after I had come back from the front of the car.

Q. From the front end of the car. And he was seated there, when you had this talk with him?

A. No, sir. When I stopped the car, he asked me what I was stopping him for, and I told him he had dam-

(Testimony of Francis Wildern Cassin)

age on the front end of his car, and that I would like to see it. I walked up to the front of the car, looked at the damage, and came back to the driver's side.

Q. He was still seated there?

A. Yes, sir. Mr. White was still seated in the car, and the motor was running.

Q. You then asked him to turn off the motor?

A. Yes, sir.

Q. And he did?                      A. Yes, sir.

Q. Where did he get the license from, the driver's license that he showed you?                      A. Out of a billfold.

Q. And that was in which pocket? [104]

A. That I couldn't recall.

Q. Did he sit there and reach in his pocket?

A. No, sir. He opened the car and stepped out.

Q. And stood there and handed you the license?

A. Yes, sir, and we smoked a cigarette.

Q. You smoked a cigarette together?

A. Yes, sir.

Q. And you used your flashlight right there?

A. Yes, sir.

Q. To examine the license and get his name and number?

A. No, I wouldn't have any recollection of his number. Just to identify him.

Q. You didn't take the number, but just his name?

A. Yes, sir, just to identify him.

Mr. Menzies: I am sorry. I can't hear you.

Q. By Mr. Nourse: Did you make any notes then?

A. None whatsoever.

(Testimony of Francis Wildern Cassin)

Q. None whatsoever. From the time you stopped him until he started on to drive, how long do you think you were there?

A. Well, it might have been 10 or 12 minutes, 15 minutes.

Q. You didn't have a two-way radio on your car?

A. No, sir.

Mr. Nourse: If I may, I would like to read the officer's testimony given at the coroner's inquest, your Honor. [105]

You have a copy of it, Mr. Menzies.

Mr. Menzies: What page, please, Mr. Nourse?

Mr. Nourse: Page 147. I would like to read it, not because he said anything different, but as to what he didn't say at that time. I think the court could draw some very proper inferences, in view of the other testimony given.

The Court: Proceed.

Mr. Nourse: If I may sit here and read it from here, rather than show it to the witness?

The Court: Yes.

Mr. Nourse: This comes after he had described having had the call, the radio call, and was asked to tell what he had done.

Mr. Menzies: Is that commencing at line 12?

Mr. Nourse: Line 12.

Mr. Menzies: Thank you.

(Testimony of Francis Wildern Cassin)

Mr. Nourse: (Reading):

“Will you tell us where you found it, and about the time you found it, and what your procedure was following that?

“A. The area that I patrol is from Pacific Highway, U. S. 101, to the Ocean, and what is commonly known as Balboa or Garnet, the foot of Rose Canyon, from there south to Fort Rosecrans. I was in the north beach area, when an all cars pick-up 480 came [106] out, a large sedan, dark maroon, south from Solano Beach. I immediately proceeded across Garnet to U. S. 101. I was at the intersection. There was one car that came out of the canyon with one light, a Willys-Knight, pulled into the service station, the General Petroleum. I don't know how long I was sitting at the intersection, it was a short period of time, it could have been one minute, or three minutes, I noticed a car proceeding south out of the Canyon. I waited until that car came down to the intersection. I noticed a large sedan, a Lincoln Zephyr, traveling south towards San Diego. I kicked over my motorcycle and proceeded after the car, and I as a approached the rear of the car, I noticed a Nevada license. I let the car get out on the open way, or the straightaway. I pulled up alongside of the car, and asked the driver to pull into the shoulder of the roadway, dropped back to the rear of the car, snapped on my red light, and in the meantime, the driver proceeded to the shoulder and came to a stop. I parked my motorcycle. I tried to determine how many were in the car, I only saw the one person, that was the driver. I walked alongside of the car. The first thing was the driver asked me what I was stopping him for. I said,

(Testimony of Francis Wildern Cassin)

'You have some damage on the left front of your car, and a headlight [107] out. Do you mind if I examine it?' He said, 'Not at all.' I walked up to the front end of the car. There was a dented in left headlight. I walked back to the driver, and asked him to turn off his ignition, which he did. I asked him for his operator's license which he opened the door and stepped out and handed me the driver's license. I identified the person—the identification, rather, that the person gave me was George White. The gentleman again asked me what I was stopping him for. I told him that there had been a hit and run accident up north, at Solano Beach; that there was damage to the front of his car, and I would like to inspect it. He said 'Absolutely, go right ahead.' I asked the man how far south on U. S. 101 he had driven, and he informed me from Los Angeles. I asked him if he had made any stops, and he said, 'Yes, I stopped at the Del Mar Hotel to see if I could get a room,' and I said, 'Approximately how long ago was that?' And he said, 'Twenty or twenty-five minutes.'

"I went up to the front of the car. The left headlight was out. I took my flashlight, with what little beam I had, and played it down on the bumper, looked into the light, and what I termed had the appearance of blood and flesh. I asked the gentleman where—or the defendant— [108]

"Q. Let's not call him a defendant, he is just the driver.

"A. The driver—I asked the driver where this damage had occurred, and he informed me that it had occurred at the Santa Anita race track that afternoon. I asked him if he had any objections to accompanying me to the police station, and he said no, that he was going in to the Grant

(Testimony of Francis Wildern Cassin)

Hotel; that he would drive up to the Grant Hotel, and I could look at the car all I wanted to up there. So I asked him if he would start his car and start in toward town, which he did. We proceeded in U. S. 101, and there were two motorcycle officers"—

I don't think that the rest is important, your Honor. That is all that he testified to that had anything to do with the scene of the accident.

Q. By Mr. Nourse: Now, you say that when Mr. White parked his car, he parked it facing in which direction? A. At the police station?

Q. Yes. A. North.

Q. Facing north? A. Yes, sir.

Q. That is nosed in to the curb?

A. Parellel to the curb. [109]

Q. Parallel to the curb? A. Parallel to the curb.

Q. And he went in which entrance of the police station?

A. That would be the south entrance. It faces west, the entrance, but it is the south entrance of the police station.

Q. The door faces west? A. Yes, sir.

Q. And what street did you park on?

A. U. S. 101, Pacific Highway.

Q. That is where he parked his car?

A. Yes, sir.

Q. That is an offset to the police station? It isn't a part of the main highway?

A. It is a part of the main highway, yes, sir.

Q. I am thinking of right down by the Coronado station. A. Yes, sir.

(Testimony of Francis Wildern Cassin)

Q. The Bay is which way, in which direction?

A. That would be south.

Q. That would be south? A. Yes, sir.

Q. And the highway runs east and west there?

A. No, sir, north and south. If you are driving south on U. S. 101, you can go right on to the ferry slip.

Q. And this entrance that you went into, then, faced [110] west?

A. Yes, sir, but it is the south entrance of the police station. There is a north entrance and a south entrance.

Q. And was this car parked north or south of this west entrance? A. I would say a little to the south.

Q. A little to the south? A. Yes, sir.

Q. How far? A. I couldn't say.

Q. Two or three car-lengths?

A. No, it wouldn't be that distance. There is room enough for approximately two cars in there, and he swung around and made a U-turn, and swung into the curb, and pulled in there.

Q. Parallel to the curb? A. Yes, sir.

Q. Now, when they took these pictures, the photographers then were facing south?

A. Apparently, yes, sir.

Q. That would mean their backs would be towards this west entrance?

A. No, the west entrance would be like there (indicating), the door would be there, and the car would be parked along the curb here (indicating.) [111]

Q. The car would be parked along the curb like the jury box, and the photographer would be off here?

A. Yes, sir.

(Testimony of Francis Wildern Cassin)

Q. And the officers, the highway officers, were standing there beside the photographer when the pictures were taken?

A. That I couldn't say. There were quite a few officers.

Q. There were quite a number of people there, and not just one photographer? A. Yes, sir.

Q. And Mr. White stood back in the entrance to the police station with you? A. Yes, sir.

Q. Smoking a cigarette? A. Yes, sir.

Mr. Nourse: That is all.

#### Cross Examination

By Mr. Luce:

Q. Officer Cassin, the entrance to the police station at that point is set back from the sidewalk, isn't it?

A. Yes, sir.

Q. About how far would it be from the entrance of the police station proper to the curb where the car was parked? A. Approximately 20 feet.

Q. And Mr. White was standing in the entrance to the [112] police station with you? A. Yes, sir.

Q. This photograph was taken by flashlight, was it not?

A. That I couldn't say. I believe it was, but I don't know.

Mr. Luce: That is all.

The Court: Any questions?

Mr. Lonergan: No questions.

The Court: That is all. Thank you.

Mr. Menzies: May this witness be excused, your Honor, from further attendance?



(Testimony of Francis Wildern Cassin)

The Court: Any objection on the part of the attorneys?

Mr. Nourse: No objection.

Mr. Menzies: And may the witnesses who testified yesterday be excused?

The Court: Any objection on the part of counsel?

Mr. Luce: No, sir.

Mr. Nourse: None.

The Court: They may be excused.

Mr. Nourse: Oh, there is one further question I would like to ask the witness just leaving the stand, and he can answer from there.

Q. By Mr. Nourse: That was a 55-mile zone where you stopped Mr. White, was it? A. Yes, sir. [113]

Mr. Nourse: That is all.

(Witness excused.)

Mr. Menzies: Mr. Hake.

LUTHER M. HAKE,

called as a witness by and on behalf of the defendant Home Indemnity Company of New York, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Your full name, please?

The Witness: Luther M. Hake.

The Clerk: How do you spell your last name?

The Witness: H-a-k-e.

By Mr. Menzies:

Q. Mr. Hake what is your business or occupation?

A. I am a traffic officer on the California Highway Patrol.

(Testimony of Luther M. Hake)

Q. How long have you been a traffic officer on the California Highway Patrol?

A. A little over 10 years.

Q. During that time you have had occasion to investigate traffic accidents?

A. Yes, sir.

Q. Many or few?

A. A great many.

Q. Now, directing your attention to on or about [114] the 20th of July, 1946, did you investigate an accident that occurred at Solano Beach, California?

A. Yes, sir.

Q. What time of day or night was it that you first commenced your investigation?

A. We received a radio call from our station in San Diego at 10:37 P. M.

Q. Where were you at that time?

A. We were between Oceanside and Carlsbad, California on U.S. 101 highway, headed south.

Q. When you say "we," was there anyone else with you at that time?

A. Yes, sir.

Q. Who?

A. Officer Jack McCreary.

Q. And what did you do after you got this radio call.

A. We proceeded south to the scene of the accident as rapidly as possible.

Q. Where did you find that this accident took place, that you received the call upon?

A. This accident took place on U.S. 101 highway in Solano Beach, approximately 300 feet north of the Rancho Santa Fe intersection.

Q. Was there any pedestrian crosswalk there at that place? [115]

A. No, sir.

Mr. Nourse: You mean at the place of the accident?

Mr. Menzies: Of the accident.

(Testimony of Luther M. Hake)

The Witness: No, sir, there was not.

Q. By Mr. Menzies: What was the condition of the road at that time? A. The pavement was dry.

Q. What was the weather condition, clear or foggy?

A. The weather was clear.

Q. What did you do when you got there?

A. We parked our automobile in a safe place and immediately got out of the car and went to the location where the two people were lying on the east shoulder and saw their condition. We radioed Station O, which is the Oceanside police department and had them dispatch two ambulances to the scene.

Q. What condition were the people in?

A. Both—

Mr. Nourse: That seems to me to be entirely immaterial in this action, your Honor.

The Court: In this action is it material?

Mr. Nourse: It is admitted they died, and it is admitted as a result of this accident.

Mr. Menzies: I think that is probably true.

The Court: I think so.

Q By Mr. Menzies: What did you do after you radioed [116] for the ambulance?

A. I immediately tried to ascertain who the driver of the vehicle that struck these people was.

Q. Were you able to do that?

A. No, sir, not at the time.

Q. Did you make any investigation or take any measurements there at the scene of the accident?

A. Yes, sir.

(Testimony of Luther M. Hake)

Q. What did you do in regard to making that investigation?

A. We endeavored to establish the point of impact.

Q. How?

A. By where the debris from the front part of the vehicle had been thrown in a general southerly direction.

Q. And what did you find there?

A. Found numerous pieces of the headlight lens and numerous pieces of pot metal from the headlight lens, and the headlight grill, and from the parking lamp.

Q. Now, I will show you here a part of the headlight pot metal frame, and ask you to examine it and tell me whether or not you found any portions of this at the scene of the accident, if you can.

Mr. Nourse: Just a minute. I object to that as entirely immaterial in this action. It is admitted by the answer of the Home, and alleged in the complaint, and it is admitted [117] in the answer that it was the Lincoln car driven by Mr. White that struck these people. All that this could have any relevance for would be to identify the car.

Mr. Menzies: No, that is not my purpose, your Honor. The court can perceive from an examination of the metal that when the bodies were struck there must have been terrific force applied to do the damage not only to the bodies but to the car, and that anyone who was driving that car must have known that he was in an accident and must have known that he had hit somebody.

The Court: Overruled. Proceed.

The Witness: I do.

(Testimony of Luther M. Hake)

Q. By Mr. Menzies: Now, which portion of this metal did you find at the scene of the accident?

A. I picked up this smaller section on the right side of this exhibit, and also the large section in the center.

Q. Do you know where the other portion came from, the larger portion that is semi-circular?

A. Yes, sir.

Q. Where did that come from?

A. That was taken from the left headlight grill on this Lincoln sedan.

Q. To whom did you give this material that is mounted on this board after you had picked it up?

A. I gave it to Officer James Brewer of the California [118] Highway Patrol.

Mr. Menzies: Now, I will offer it in evidence, and may I have a stipulation at this time that it may be withdrawn, as the Highway Patrol are very anxious to keep this exhibit, your Honor.

Mr. Nourse: I still renew my objection to its introduction in evidence. I don't think it proves anything unless you are going to prove the strength of the metal and the sound it would make. I think we have had other evidence along this line.

Mr. Menzies: Well, it is quite possible that that will be introduced in evidence, or some testimony along those lines. As a matter of fact, I have witnesses, your Honor, that will throw some light on that very question, on the objection that has been raised.

The Court: In evidence.

Mr. Menzies: And may it be withdrawn at the conclusion of the case and turned over to one of the officers?

(Testimony of Luther M. Hake)

The Court: So ordered.

Mr. Menzies: Thank you, sir.

The Clerk: That is Exhibit J for the Home Indemnity Company.

(The article referred to was marked Defendant Home Indemnity Company Exhibit J, and received in evidence.) [119]

Q. By Mr. Menzies: Now, where did you establish the point of impact?

A. Approximately in the center of the middle lane of the three-lane highway.

Q. What did you find there that indicated the point of impact?

A. There were pieces of dried mud, pieces of glass, pieces of the headlight and grill.

Q. Anything else from the car?

A. Yes, sir, there was a series of skid marks.

Q. Could you tell with relation to the point of impact whether or not that came from the car that had been in the collision there?

A. There were several sets of skid marks, and they couldn't be attributed to any particular automobile. I imagine there was three or four sets of skid marks in approximately the same direction, in that same locality.

Q. Could you tell the court the length of those skid marks that were there?

Mr. Nourse: Just a moment. Your Honor, he said he couldn't connect them up with this accident at all. It would be entirely immaterial.

(Testimony of Luther M. Hake)

Mr. Menzies: It goes to the weight and not to the admissibility. In other words, there is testimony in this record that there was a screeching of brakes, a scream, and the [120] crash.

The Court: How much weight, counsel, would you give to it? You are correct that it goes to the weight, but how much weight would the court give, with the testimony showing that there were a number of skid marks there.

Mr. Menzies: If the court is satisfied there was an application of brakes by the car, in the light of the other witnesses' testimony—

The Court: That is the testimony so far, unless it is disputed, counsel.

Mr. Menzies: Very well.

Q. By Mr. Menzies: Now, did you take any measurements from the point of impact to where either of the two bodies were? A. Yes, sir.

Q. There were bodies there of a man and a woman; isn't that correct? A. Yes, sir.

Q. What did you find to be the distance from the point of impact to where the body of the woman was found?

A. It was approximately 50 feet.

Q. How far was it from the point of impact to where the body of the man was?

A. It was approximately 57 feet.

Q. Now, later did you go to San Diego? [121].

A. Yes, sir.

Q. Did I understand you correctly to say picked up some glass there at the scene of the accident?

A. Yes, sir.

(Testimony of Luther M. Hake)

Q. What did you do with that glass?

A. I put it in an envelope and kept it in my possession until I turned it over to Mr. Ray Pinker.

Q. Of the Los Angeles police department?

A. Of the Los Angeles police department.

Q. And he has it now, so far as you know?

A. Yes, sir.

Q. Now, when you got to San Diego was Officer McCreary with you?           A. Yes, sir.

Q. What did you find there?

A. I found a 1942 Lincoln Zephyr sedan that was parked on 101 Highway, headed north, at the west entrance to the San Diego police station traffic bureau, with several San Diego police officers standing in the vicinity. At that time I asked where the driver of the sedan was, and he was pointed out to me standing over under the archway at the entrance to the traffic bureau.

Q. Then what did you do?

A. I asked the sergeant in charge of the traffic bureau on that evening, that detail, if I could have some pictures [122] taken, to which he replied in the affirmative, and their cameraman showed on the scene in a few minutes to take the photographs that I wanted.

Q. While those photographs were taken, do you know where the defendant George White was?

A. Yes, sir.

Q. Where?

A. He was standing in the same location in which I first saw him.

Q. That is in the archway of the entrance to the police traffic bureau; is that correct?           A. Yes, sir.



(Testimony of Luther M. Hake)

Q. Did you talk to the defendant White at that time and place? A. Yes, sir.

Q. Was anybody else present when you talked to him?

A. Yes, sir.

Q. Who? A. Officer McCreary.

Q. What occurred at that time, when you talked to the defendant White?

A. I asked Mr. White if he were the driver of the automobile parked by the curb, pointing to the same, and he said that he was. I also asked him how the damage to the left front fender was gotten there, and he emphatically said that [123] he knew nothing of an accident.

Q. I am sorry. I didn't hear you.

A. He emphatically said that he knew nothing of any accident, and that he knew nothing of the damage on the front end of his automobile.

Q. Was anything else said at that time?

A. I asked Mr. White where he was coming from, and he said he was coming from Los Angeles to the Grant Hotel in San Diego. I also asked him if there were anyone with him at the time, and he said he made the whole trip by himself. I also asked him if he had stopped any place en route, and he answered, "No."

Q. What else happened?

A. From the evidence of the damage on the car, the fact that Mr. White was the driver of the car, I informed him that he was under arrest for violation of Section 480 of the California Vehicle Code, and Officer McCreary and myself took him to the San Diego County jail and had him booked under those charges.

(Testimony of Luther M. Hake)

Q. Did you have any conversation with Mr. White between the time of the conversation you have just related, and when you booked him in the San Diego County jail?

A. En route to the County jail I questioned him again as to the damage on the front fender.

Q. What did you say to him and what did he say to you, [124] as near as you can recall?

A. I asked Mr. White how anyone could hit an object and leave such damage to the car and not know it, as he contended that he did not know it, and he still denied knowing anything about an accident.

Q. What did he say in that respect, as near as you can recall?

A. Just in those words, "I know nothing of any accident."

Q. I will show you here five color transparencies and ask you to tell me whether or not those five color transparencies are a fair representation of the condition of the Lincoln Zephyr sedan that Mr. White was driving at the time you first saw it.

A. These are the same, with the exception of this one photograph where we have pieces of the grill and the headlight lens, which had been removed by Officer Brewer and myself.

Mr. Menzies: We will offer them in evidence at this time as the defendant Home's exhibit next in order.

The Court: In evidence.

The Clerk: Defendant Home's Exhibit K in evidence.

(The documents referred to were marked Defendant Home Indemnity Company Exhibit K, and received in evidence.)

Mr. Menzies: You may examine. [125]

(Testimony of Luther M. Hake)

Cross Examination

By Mr. Nourse:

Q. I will call the witness' attention to the following testimony given at the Coroner's inquest, and ask you if you did not testify as follows, Mr. Hake,—

Mr. Menzies: Speak just a little louder, Mr. Nourse. It is hard to hear you.

Q. By Mr. Nourse: Question by Mr. Orme:

"Oh, by the way, Mr. Hake, was there any—did you at any time call his attention to the damaged condition of the fender and the hood, or was it called to his attention in your presence, and any questions asked him pertaining to that? Or did he make any explanation as to how or when the damage occurred to the fender and the hood?"

The Court: Referring to Mr. White?

Q. By Mr. Nourse: Mr. White, Yes. (Continuing):

"A. He stated nothing about it.

"Mr. Orme: He had no explanation?

"A. No explanation at that time."

Did you so testify?

The Court: Show the witness the transcript.

(The document was handed to the witness.)

Mr. Nourse: Reading from line 7 and I read through line 16. [126]

The Court: And you may read back of that, if you need to, to connect up the testimony.

Mr. Nourse: Mr. Orme, I may explain to the court, was the deputy district attorney. Mr. Menzies, you were there. Was he not?

Mr. Menzies: I believe he was.

The Witness: That is correct, counsel.

(Testimony of Luther M. Hake)

Mr. Nourse: No further cross examination.

The Court: Mr. Luce?

Mr. Luce: No questions, your Honor.

Mr. Lonergan: None, your Honor.

The Court: That is all. Call your next witness.

(Witness excused.)

Mr. Menzies: Your Honor, may I put a witness on out of order who has to return to Santa Barbara?

The Court: Yes.

Mr. Menzies: Mr. Brewer.

### JAMES BREWER,

called as a witness by and on behalf of the defendant Home Indemnity Company of New York, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

The Clerk: Your full name, please?

The Witness: James Brewer.

The Clerk: B-r-e-w-e-r? [127]

The Witness: Correct.

By Mr. Menzies:

Q. Mr. Brewer, what is your business or occupation?

A. Traffic officer of the California Highway Patrol.

Q. And what are your duties?

A. Criminologist in the laboratory of the Highway Patrol.

Q. What experience have you had in laboratory work of that character?

A. About nine years with the department.

(Testimony of James Brewer)

Q. What was your preparatory education in regard to that matter?

A. Two years in microscopy, in the study of medicine, biochemistry and associated subjects.

Q. You have specialized in that type of work for how long?

Mr. Nourse: We will stipulate to his qualifications, your Honor.

Mr. Menzies: I think the court would like to hear them.

The Witness: About fourteen years.

Q. By Mr. Menzies: Are you a graduate of any university?

A. I did not graduate.

Q. Now, directing your attention to the defendant Home's Exhibit J in evidence, I will ask you to examine it and tell [128] me whether or not you have ever seen that before.

A. I have. It was delivered to me by Officer Hake.

Q. When?

A. I believe it was the 23rd of July in '46.

Q. 1946? A. Yes.

Q. What did you do with those pieces of metal that are on that Exhibit J?

A. I took them to the laboratory in Sacramento and made an examination of them.

Q. What was the nature and extent of that examination that you made in Sacramento?

A. A comparison with the line of fracture between the two parts, the one recovered from the scene and the other from the car, the car in question.

(Testimony of James Brewer)

Q. What did you find?

A. I find a perfect match in the line of fracture between the two parts.

Q. How did you establish that line of fracture?

Mr. Nourse: Your Honor, I object to that as entirely immaterial. This could only go to prove that this accident occurred, and that is admitted. We are just wasting time and encumbering the record.

The Court: Unless there is some further testimony which this witness is going to give, or some other witness, with [129] reference to the strength of this material and what would be necessary to place it in the condition it is in before the court.

Mr. Nourse: I call your attention to the fact that he is only asked to match it up.

The Court: That would be necessary as a foundation, when to ask a question about the strength, I assume, counsel. Proceed.

Mr. Menzies: I expect to prove that by another witness, your Honor.

The Court: Very well. Proceed.

Q. By Mr. Menzies: Are you able to tell the court the amount of force that it would take to fracture that metal as it is fractured there, as you have matched it up?

A. I am not prepared to estimate the force necessary.

Mr. Menzies: That is all.

The Court: Any questions?

Mr. Nourse: No, your Honor.

Mr. Luce: No questions.

Mr. Lonergan: No questions.

The Court: That is all.

(Witness excused.)

The Court: We will take the morning recess.

(A short recess was taken.)

The Court: You may proceed, gentlemen. [130]

Mr. Nourse: If your Honor please, if I may have the indulgence of court and counsel, I would like to recall Officer Cassin for one question, and also the last witness, Mr. Brewer.

Mr. Menzies: Would you mind taking Mr. Brewer first? He has to return to Santa Barbara.

Mr. Nourse: They both said they had to leave. This will not take very long. I don't care which one I take first. Mr. Brewer.

### JAMES BREWER,

recalled as a witness for the defendant Home Indemnity Company of New York, having been previously sworn, was examined and testified further as follows:

#### Cross Examination (Continued)

By Mr. Nourse:

Q. Mr. Brewer, in addition to examining this light, did you also examine the blood marks on the car?

A. I did.

Q. And you determined they were human blood?

A. I did not make the precipitant test. Ray Pinker made that.

Q. Did you examine and take photographs of the marks on the paint? A. I did.

Q. Did you match those with the clothing of the deceased [131] man?

A. I saw photographs that were prepared by Ray Pinker of the laboratory on the abrasion.

(Testimony of James Brewer)

Q. And you went down and determined that the texture marks on the car were the marks of his clothing?

A. I did not make the examination on it.

Q. You examined the exhibit? A. I did.

Q. Now, you went down to San Diego on the 31st of July, at the time the preliminary hearing was set, at which time Mr. White pleaded guilty? A. Yes, sir.

Q. And you discussed in the office of Mr. Whelan, the District Attorney, your findings and the findings of Mr. Pinker as to blood and clothing marks and the fracture in the headlight? A. I did.

Q. And was Mr. Menzies present?

A. I believe he was.

Mr. Nourse: Thank you. That is all.

#### Redirect Examination

By Mr. Menzies:

Q. That was after the plea of guilty and the preliminary examination there, was it not?

A. Yes, sir. [132]

Mr. Nourse: That is what I asked, that was on July 31st.

Mr. Menzies: But you did not fix the time.

Mr. Nourse: Not before or after the preliminary, no.

Mr. Menzies: Well, it is fixed now. That is all.

May this witness be excused?

The Court: He may be excused.

(Witness excused.)

Mr. Nourse: Mr. Cassin.



FRANCIS WILDERN CASSIN,

recalled as a witness for the defendant Home Indemnity Company of New York, having been previously sworn, was examined and testified further as follows:

Cross Examination (Continued)

By Mr. Nourse:

Q. Showing you Defendant's Exhibit D, Mr. Cassin, and calling your attention to the dent in the hood, on the top of the hood here,— A. Yes, sir.

Q. —or the side of the left top of the hood,—

A. Yes, sir.

Q. —do you have any recollection of seeing that damage when you were there at the point at the mouth of Rose Canyon, where you stopped Mr. White?

A. Yes and no.

Q. Well, mostly yes or mostly no? [133]

A. Well, I saw the car in Rose Canyon. I saw it later up in the garage.

Q. But are you able to say that you noticed that damage there in the dark at the scene of the accident?

A. No, sir.

Q. I don't mean the scene of the accident, but at the place where you stopped him.

A. Yes, sir. I wouldn't swear to that.

Mr. Nourse: That is all.

Mr. Luce: Just a moment.

Q. By Mr. Nourse: Did you talk with Mr. Menzies within two or three days after the accident, or with Mr. Clifton?

A. No, sir, to my knowledge, I didn't talk to those gentlemen until in November; only at the Coroner's inquest, when I was under questioning.

(Testimony of Francis Wildern Cassin)

Q. They were present at the Coroner's inquest?

A. Just Mr. Menzies and John Holt, the attorney.

Q. And Mr. Clifton, was he not there?

A. I didn't recognize him.

Mr. Nourse: Mr. Clifton, will you stand up?

The Witness: The first time I remember seeing that man is when he sat in my home approximately two or three weeks ago.

Mr. Nourse: That is all.

Mr. Luce: No questions. [134]

The Court: That is all.

Mr. Menzies: May this witness be excused from further attendance, your Honor?

The Court: Yes.

(Witness excused.)

Mr. Menzies: May I ask counsel if they will stipulate that if Officer McCreary were called—he is in the court room—his testimony would be the same as that of Officer Hake? That is his partner.

Mr. Nourse: As to what portion of it? All of it?

Mr. Menzies: I assume he was present throughout all of it and heard the conversations.

Mr. Nourse: Let me ask—

Mr. Menzies: I will put him on.

The Court: No, just a minute, counsel.

Mr. Nourse: I would like to ask the officer one question, because you are asking me to stipulate blind.

The Court: Very well.

Mr. Menzies: All right.

Mr. Nourse: Which is the officer?

(Discussion between counsel and Officer McCreary off the record.)

Mr. Nourse: I can't so stipulate, counsel.

Mr. Menzies: Very well. Take the stand. Thank you. [135]

JACK McCREARY,

called as a witness by and on behalf of the defendant Home Indemnity Company of New York, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Your full name, please.

The Witness: Jack McCreary.

The Clerk: How do you spell that?

The Witness: M-c-C-r-e-a-r-y.

By Mr. Menzies:

Q. What is your business or occupation, Mr. McCreary?

A. Traffic officer, California Highway Patrol.

Q. How long have you been a traffic officer of the California Highway Patrol? A. Twelve years.

Q. Were you with Officer Luther Hake on the 20th of July '47? A. I was, yes.

Q. 1946 I should say. A. Yes.

Mr. Nourse: I am willing to stipulate that the officer's testimony so far as anything that occurred at the scene of the accident would be the same as that of Officer Hake.

Mr. Menzies: Well, let's get at it this way, and maybe we can save some time: [136]

(Testimony of Jack McCreary)

Q. You were present and heard Officer Hake testify?  
A. Yes, sir.

Q. If those same questions were asked you, would you give any different answers?

A. At the south entrance of the San Diego police station Officer Hake was talking to Mr. White a few minutes before I arrived where the two of them were, and I relieved Officer Hake and Officer Cassin of standing by Mr. White, and at that time neither one of us said anything.

Q. When you say "neither one of us" you mean yourself and Mr. White?  
A. And Mr. White, yes, sir.

Q. Did you talk to Mr. White at any time there at the scene of the accident, or anywhere else?

A. En route to the sheriff or the County jail we talked slightly. Mr. White seemed to be concerned—

The Court: Do not make any assumptions.

Q. By Mr. Menzies: What was said?

A. Mr. White said he was worried about his contracts more than anything else.

Q. Anything else, that you can recall?

A. Not at that time, no.

Mr. Menzies: That is all. [137]

#### Cross Examination

By Mr. Nourse:

Q. Was anything said at any time in your presence or was Mr. White shown any damage to the front of his car?

A. The only time, while we were standing at the doorway of the police station, the pictures were taken of the car, and from our position we could see the front of the car and the part of the car that the pictures were taken of.

(Testimony of Jack McCreary)

Q. Weren't the photographers between Mr. White and the portion of the car of which they were taking the pictures?

A. No, sir.

Q. The doorway was north of the car, was it not?

A. That's right.

Q. And you were standing then about northeast of the car?

A. Yes, sir.

Q. And about how far away?

A. Approximately 20 feet.

Q. It is 20 feet from the curb line, is it?

A. That is to the car. The car was right at the curb line.

Q. Right at the curb line. Then the car was directly west of where you were standing?

A. It was slightly southwest.

Q. How much south of that entrance was the car?

[138] A. Oh, approximately seven feet.

Q. Seven feet? A. Yes, sir.

Q. Now, you stated to me a moment ago that there was no conversation with Mr. White relative to the damage to his car in your presence at any time; is that right?

A. That's right.

Q. And you were present in the car when he was taken from the police station to the jail?

A. Yes, sir.

Mr. Nourse: That is all.

#### Redirect Examination

By Mr. Menzies:

Q. Was there any conversation after you got out of the car and before you went into the jail with relation to the damage to the front end of Mr. White's car that you heard?

A. No, sir, there wasn't.

(Testimony of Jack McCreary)

Q. You didn't hear any?      A. I didn't hear any?

Mr. Menzies: That is all. Thank you.

The Court: That is all. Thank you. He may be excused.

(Witness excused.) [139]

RAY H. PINKER,

called as a witness by and on behalf of the Home Indemnity Company of New York, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Your full name, please?

The Witness: Ray H. Pinker, P-i-n-k-e-r.

By Mr. Menzies:

Q. Mr. Pinker, what is your business or occupation?

A. Technical director of scientific crime investigation laboratory of the Los Angeles Police Department.

Q. How long have you been connected in that capacity with the Los Angeles Police Department?

Mr. Nourse: We will stipulate to the witness' qualifications.

Mr. Menzies: I think we should have them for the record and for the benefit of the court.

The Witness: For the past 17-1/2 years.

Q. By Mr. Menzies: What has been the nature and extent of your duties there?

A. Briefly, the search for, collection of, examination and preservation of physical evidence, the adaptation of the chemical and physical sciences to the examination of the physical evidence, and the giving of testimony before hear-

(Testimony of Ray H. Pinker)

ings and in court pertaining to the scientific facts as established [140] from such examinations.

Q. What particular training did you have to fit you for that type of work?

A. Two years Department of Chemistry, University of California in Los Angeles; three years Department of Chemistry, University of Southern California in Los Angeles; a year teaching fellow, Department of Chemistry, University of Southern California; a half year research fellow, Department of Chemistry, University of Southern California; two years Arthur R. Maas, a commercial testing laboratory; forensic chemist and chemist for the Los Angeles Police Department since the first of July, 1929.

Q. Now, directing your attention to a photograph here, I will ask you to examine it and tell me whether or not you can determine that is a part of a 1942 Lincoln Zephyr sedan.

A. It appears to be.

Q. I will show you here Defendant's Exhibit E, and ask you to examine it and tell me whether or not you have ever seen that car that is shown in that picture.

A. Yes, I have.

Q. When and where did you first see it?

A. May I refer to my laboratory notes, in order to refresh my recollection as to the date?

Q. You may.

A. It was on the 23rd of July, 1946, and I examined [141] that automobile in the city of San Diego.

Q. I will show you Defendant's Exhibit F, G, H, I, and D, and ask you whether or not they are fair representations of that 1942 Lincoln Zephyr sedan that you examined on the 23rd of July, 1946.

A. They are.

(Testimony of Ray H. Pinker)

Q. What examination did you make of that Lincoln sedan?

A. I made an examination of certain contaminations on the middle part of the sedan. I found fabric brush marks and an imprint of fabric material into the paint. I made measurements of the fabric brush marks. I removed a copy of the fabric imprint by means of Scotch tape. I removed some debris I found on the left front fender, also debris which I found on the bumper on the left side, that is, immediately adjacent to the left front fender. I also took samples of paint which had sheared on this fender, which was present in the form of narrow long strips sheared from the metal itself. I took a sample of that paint. I also removed portions of a sealed beam headlight lens which still remained in the headlight.

Q. Did you make any other examination, other than what you have told us?

A. I also examined clothing allegedly belonging to two victims of the traffic fatality.

Q. Where did you get that clothing? [142]

A. I will again have to refer to my notes.

I received Mr. and Mrs. Lee's shoes, and Mr. Lee's underclothing, socks, handkerchief, shirt and trousers from Sergeant Latourette. I received a Mrs. Lee's slip from Mr. George Harris at the Bailey Mortuary in Oceanside.

Q. You got that personally, did you?

A. I did. I received Mrs. Lee's dress from Officer L. M. Hake.

Q. After you made this examination, what did you do with the material that you had obtained?

A. I have saved it.



(Testimony of Ray H. Pinker)

Q. And then what did you do with it?

A. Well, I made an examination of the clothing. I found contaminating the trousers of Mr. Lee some fragments, tiny fragments of paint. I found in all seven tiny fragments; two on the left rear pocket, four on the outer surface of the fabric, and one inside the left leg. I also found one additional fragment of paint in the shakings contained in the paper that had been used to wrap the clothing.

I made an examination of this paint and compared it with samples of paint I had removed from the vehicle. I found that the paint consisted of two layers, a primer coat bluishgray in color, and an outside polychrome gray paint. I found the fragments I removed from the clothing to be similar to the fragments I took from this vehicle. [143]

I made an examination of the reddish fatty debris which I removed from the left fender and from the bumper. I found this debris to consist of fat tissue and of human blood. Also, in connection with the debris, I removed from the underneath lower edge of the bumper debris which I found to be composed of skin tissue and villous hair. I had procured samples of villous hair from the legs of Mrs. Lee and from the legs of Mr. Lee. I found this villous hair to be more similar to the hair from Mrs. Lee than from Mr. Lee.

I found paint smears on the trousers in the exact center in the back, just below the belt line, and these paint smears on the trousers were bluish-gray in color. On the shirt belonging to Mr. Lee I found paint smears along the right elbow, and paint smears on the tail, the back portion, the lower back portion of the tail of the shirt.

(Testimony of Ray H. Pinker)

I found the fabric weave to be a basket weave. The count of threads running in one direction was 18 to the centimeter. The count in the opposite, the perpendicular direction to the face was 20 to the centimeter. I found that these fabric weaves agreed with the fabric brush marks, within the limits of distortion of the fabric brush marks I had found on the vehicle. I further found that the imprint on the vehicle which I had removed was a basket weave, and the fabric composition in the shirt was also basket weave, having the same dimensions or court. [144]

Q. What else did you do?

A. At the time of my examination of the vehicle there was still remaining on the vehicle some portions of the pot metal. I see some before me here. There was also furnished at the time, I believe by Officer Hake, some pieces of pot metal which had been found at the scene of an accident. I observed Mr. James Brewer of the California Highway Patrol fit two of these pieces which had been found at the scene with pieces still remaining on the vehicle. I personally observed two contiguous fits. I examined the samples of glass that had been brought me by Officer Hake, which had allegedly been found at the scene of an accident. I found the glass to be composed of two types. One type was from a sealed beam headlight lens, and consisted of both lens sections of glass, and reflector sections of glass. I further found additional glass, which were the fragments from two Lincoln Zephyr parking light lenses.

I observed on the vehicle that both left fender parking light lenses had been broken and were missing. I was un-

(Testimony of Ray H. Pinker)

able to fit any of the fragments of glass together contiguously, that is, fragments found at the scene with fragments I found in the vehicle.

Q. Did you do anything else?

A. To the best of my recollection, that is all.

Q. Now, did you examine the metal fender, where the [145] indentations are shown there on the exhibits?

A. Yes, I did.

Q. Can you tell me, if you know, the gauge of that metal?

A. I do not know the gauge of the metal. I observed that it was heavy gauge metal, thick metal, and in one spot it had been torn for a considerable distance.

Q. Now, did you come to any conclusion as a result of your examination and test? A. I did.

Q. And what conclusion did you come to?

A. I came to the conclusion—

Mr. Nourse: That is objected to as entirely immaterial. The only conclusion that could ever have been material was that that car hit the victims, and that is admitted here.

Mr. Menzies: It goes to one question, your Honor, and that is the knowledge of this defendant White.

The Court: I will permit it.

The Witness: It was my opinion, and it is my opinion that the 1942 Lincoln Zephyr, Nevada license No. 331674, forcibly collided with the two victims whose clothing was submitted to me.

Q. By Mr. Menzies: Can you tell the court the amount of force that would be necessary to cause the indentation in that left front fender of that 1942 Zephyr? [146]

(Testimony of Ray H. Pinker)

Mr. Nourse: Objected to as no foundation laid and calling, therefore, for the conclusion of the witness.

The Court: There is no foundation.

Q. By Mr. Menzies: In your work as investigator for the police department in regard to physical evidence, have you had occasion prior to this time to determine the cause of indentations similar to this in other automobiles?

A. I have on numerous occasions during the past 17-1/2 years.

Q. Have you been able to do so?

A. Yes, I have, in many instances.

Q. Are you able to do so in this case? A. Yes.

Q. What, in your opinion, caused it?

A. In my opinion, this damage to the left front fender, the damage to the hood, the damage to the headlight lens and assembly was caused by the vehicle striking the back, the middle back portion of the body of the person wearing Mr. Lee's clothing, who I presume was Mr. Lee.

Q. Now, can you tell the court from your examination of this car whether any part or portion of the body of Mr. Lee came across or on top of the left side of the hood of this Lincoln Zephyr sedan? A. I can.

Q. Will you just tell the court? [147]

A. It is my opinion that the back of the shirt, and the back and elbow area of the right arm of Mr. Lee came over on top of the fender and scraped along the left side of the hood.

Q. How much, if you know, of the body of Mr. Lee was at one time or another resting across the hood?

A. The portion extended from somewhere below the belt line in the rear up to the right shoulder portion. How

(Testimony of Ray H. Pinker)

much more in addition to that, I cannot say. It was at these points where I found paint contaminations on the clothing.

Q. Did you see the body of Mr. Lee? A. I did.

Q. Can you describe the size and approximate weight to the court.

A. No, I cannot, inasmuch as the only portion of the body I examined was the lower limbs, for the purpose of removing hairs from the legs.

Q. Well, didn't you also make an examination of the brain?

A. I did, yes; I was not present at the time the brain was removed, however.

Q. Do you know, and can you tell the court the nature and extent of the force that would have to be applied to cause the damage that you observed on this Lincoln?

Mr. Nourse: Objected to as foundation not laid, and [148] calling for the conclusion of the witness.

The Court: Do you think you have laid a sufficient foundation, counsel?

Mr. Menzies: I believe there is sufficient foundation, yes, your Honor.

Mr. Nourse: That is a matter for a mechanical engineer, and this man is qualified as a chemist.

The Court: I sustain the objection.

Q. By Mr. Menzies: Have you, during the time you have been in the police department, made examinations similar to this one to determine the force that was necessary to produce injuries to the car such as are indicated in the exhibits that are before you there, Mr. Pinker?

Mr. Nourse: Objected to as immaterial.

(Testimony of Ray H. Pinker)

The Court: I will permit it.

The Witness: I have made examinations of motor vehicles, to determine the extent of damage to them, have correlated my observations of the amount and degree of damage with eyewitness description and observation of the accidents in which the suspected vehicles were allegedly involved. I also have observed a number of traffic accidents personally and observed the relative damage done to the respective vehicles.

Q. By Mr. Menzies: Can you tell the court from your examination in this case the approximate amount of force that would be necessary to produce the injuries to the vehicle that [149] are shown by the photographs before you there?

Mr. Nourse: Please answer that question "Yes" or "No."

The Witness: Yes.

Q. By Mr. Menzies: What was it?

Mr. Nourse: Objected to as calling for a conclusion of the witness and no foundation laid for expert testimony to the effect by this witness.

The Court: That goes to the weight. There is some foundation. Let us have your answer.

The Witness: I can only say that the force was relatively great. It is the greatest amount of damage that I have ever observed in 17-½ years of examination of vehicles which were suspected of and by physical evidence proved to have struck human beings.

Mr. Nourse: I will ask that go out as entirely immaterial, and purely a conclusion of the witness, and not

(Testimony of Ray H. Pinker)

based on facts and would be hearsay. It would be absolutely impossible for us to meet that. It isn't based on any scientific fact whatsoever or scientific knowledge. It is the same knowledge that any layman might have that looked at a thing and said, "This is greater than I ever saw before."

The Court: There is some justification for the statement because of the fact that the average layman would not have had the experience. That is the only thing, counsel. I will permit it to stand. [150]

Q. By Mr. Menzies: Upon what do you base that conclusion, Mr. Pinker?

A. Well, my conclusion is based upon my observation of the damage that has been done to his vehicle and my examination of damage done to many other vehicles in past matters which I have had under investigation, where those vehicles have been proved to have struck human beings. The proof has been by physical evidence or by eye-witness observation on the part of some witness.

Mr. Menzies: You may examine.

### Cross Examination

By Mr. Nourse:

Q. The amount of damage that would be done to a piece of metal on an impact with something else would depend upon the weight, would it not, of what it hit?

A. Weight is a factor, yes. Velocity is another.

Q. Yes, velocity, and whether or not there was one blow followed by another? A. I don't believe—

The Court: Successive countacts, you are talking about?

(Testimony of Ray H. Pinker)

Mr. Nourse: Successive contacts.

The Witness: Yes. Of course, the total damage would be the accumulation of all the contacts, whether one contact or multiple contacts.

Q. By Mr. Nourse: Do you know the weight of the Lincoln? [151]      A. No, I do not.

Q. The force with which it hit at any number of miles per hour would depend on its weight, would it not?

A. Weight is a factor.

Q. Well, isn't weight plus velocity equal to the total energy that is applied?      A. That is true.

Q. You don't know the speed it was traveling, do you?

A. No, I do not.

Q. And you don't know the weight?

A. I can only say the speed was relatively great.

Q. Was the weight relatively great, too?

A. Well, weight, of course, is a constant factor.

Q. I know it is a constant factor, but you don't know what it was, do you?      A. No, I don't.

Mr. Nourse: That is all.

The Court: Any other questions?

Mr. Luce: No questions.

Mr. Lonergan: No questions.

The Court: That is all.

Mr. Menzies: May this witness be excused?

Mr. Nourse: Oh, there is one question I forgot.



(Testimony of Ray H. Pinker)

Q. By Mr. Nourse: Did you go down to the preliminary hearing on July 31st? [152]

A. Yes, I did.

Q. Did you participate in the conference which Mr. Holt—do you know Mr. John Holt. A. Yes.

Q. —and this attorney, Mr. Menzies, had?

A. Mr. Menzies was not present. Mr. Holt was present, and Mr. Brewer was present, and a number of members of the California Highway Patrol, and some members of the District Attorney's staff, including the District Attorney.

Q. But you don't remember Mr. Menzies being there?

A. Mr. Menzies was not present in the District Attorney's office during the conference.

Q. Or was—will you stand up, Mr. Clinton—was this gentleman there?

A. No. I saw both gentlemen about the building.

Q. Did you discuss your findings with either of them?

A. No, I did not.

Mr. Nourse: That is all.

The Witness: Am I excused, your Honor?

The Court: Yes.

The Witness: Thank you.

(Witness excused.)

The Court: We will recess until 2:00 o'clock.

(Whereupon, at 11:55 o'clock a. m. a recess was taken until 2:00 o'clock p. m. of the same day.) [153]

Los Angeles, California, Tuesday, January 21, 1947.  
2:00 P. M.

Mr Nourse: Your Honor please, counsel has kindly consented that I may call a witness out of order. I would like to call Mr. John Holt, an attorney at this bar, who has kindly come up from San Diego to give his evidence, if I may call him now.

The Court: Mr. Nourse, can you give me some idea about how long your side will take?

Mr. Nourse: I stated to the clerk and to counsel here that—they think they will have about one hour of direct examination this afternoon, and I think that it will take us at least an hour and a half to put on our rebuttal, so I do not see how we can finish, with argument, before tomorrow noon. Mr. Menzies I believe agrees with my statement.

Mr. Menzies: I think probably we can finish taking testimony this afternoon.

The Court: I have another case following this and that is the reason I ask.

(Another case called.)

The Court: Now, call your witness, Mr. Nourse.

Mr. Nourse: Mr. Holt, will you take the stand. please? [154]

JOHN T. HOLT

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you please state your full name?

The Witness: John T. Holt.

By Mr. Nourse:

Q. What is your business or profession, Mr. Holt?

A. I am an attorney at law.

Q. You are admitted to practice in all of the State Courts of California? A. Yes, sir.

Q. And in the United States District Court for this judicial district? A. That is quite right.

Q. When were you admitted?

A. To the practice of law in the State of California in the year 1930. I think it was 1931 in the Federal Court.

Q. Since then you have been practicing in San Diego?

A. Yes, sir.

Q. Now, were you employed by George White to represent him in the matter of the charges filed against him by the people of the State of California, charging him with involuntary manslaughter and hit and run driving, that is, Section 480 of the Vehicle Code, arising out of an accident which [155] occurred on July 20, 1946.

A. Yes, sir.

Q. When were you employed, if you remember?

A. It was on the morning of the inquest, I believe, or the evening before; one or the other.

Q. You did attend the inquest?

A. Yes, I did.

(Testimony of John T. Holt)

Q. After that inquest did you have a conversation with Mr. Menzies, Thomas Menzies?

A. Yes, sir, I had numerous conversations with him.

Q. Now, I am directing your attention to the conversation that you had with him in which the subject of George White's falling asleep on his trip on July 20th to San Diego was mentioned?

A. You mean the first one?

Q. The first one. Can you fix the date of that?

A. I can't fix the exact date, but it was between the 26th and the 31st of July, before a plea of guilty was entered.

Q. All right. Was that in person or on the telephone?

A. That was on the telephone.

Q. Will you state in substance what was said between you and Mr. Menzies?

A. We discussed several subjects. One of them was the gathering of testimony, and Mr. Menzies stated he would be kind enough to get a transcript of a statement made by a [156] Mrs. Hawkins, who was at the scene of the accident or on the scene shortly thereafter, and her statement contained a statement that this girl, who was unfortunately killed, had stated before she died, words to this effect, that she and her husband were just drunk, that is how it happened. And while we talked along, I said in effect, I can't remember the exact words, but I do remember the effect of it, I said, "Tom, George says that the next day after he made the first statement to you he told you he fell asleep, and he wants to correct that transcript when it is ready." And Mr. Menzies said, "Well, it isn't ready yet." And I said, "Well, all right."

(Testimony of John T. Holt)

Then we just went ahead and talked, and talked more about the accident.

Q. Now, have you said all that was said about his falling asleep?

A. At that particular moment in that first conversation, yes, but there was another conversation before the preliminary, a long one, in which we talked at great length about that and other matters concerning the plea of guilty.

Q. When did the next conversation occur? I call your attention to the fact that the plea of guilty was entered on July 31, 1946. When did the next conversation occur with relation to that date?

A. Oh, it was three or four days before that anyhow, [157] when we talked about it at length.

Q. Was that over the telephone?

A. That, too, was over the telephone, yes.

Q. Will you state what was said by you and by Mr. Menzies?

A. Do you want the whole conversation?

Q. Yes, give us, as near as you can recollect, the substance of the whole conversation.

A. I think Mr. Menzies may have been at the U. S. Grant or might have been in Los Angeles. I am not clear on that. But I told him that from all the evidence that he and I both had seen, that it was my best opinion that George White ought to plead guilty to hit-run. I told him that from what George had told me, he felt he must have hit these people but didn't know it, that he had fallen asleep, and that is when it must have happened; that from all the testimony that was turning up, and from the evidence that was obvious in the case at that time, his

(Testimony of John T. Holt)

car must have hit those people, and George told me while he didn't know he hit them, that he should have known it, that it must have happened while he fell asleep, and that he felt he was morally responsible. And I told Mr. Menzies, "I told George it was hard for me to believe his story," and I said, "I told him if he would make a clean breast of it and tell Judge Shell that he had hit them and became panic-stricken, which seemed the natural thing, I though it would [158] be much easier for him, if that were the truth." And I said, in effect, to Mr. Menzies, "Tom, it sounds like he is telling the truth. It could have happened." I said, "The reason I say that, George told me if they send him to San Quentin for it, he wasn't going to say he hit those people, because he didn't know he hit them, but he did feel he must have hit them when he had fallen asleep."

Then I said, "By the way, how about that transcript? He wants to change that statement."

And Tom said, "Oh, no," he said, "we have got him over a barrel. He didn't tell us he fell asleep in the written statement."

I said, "He told you the next day."

He said, "That doesn't make any difference. You haven't read the case," and he gave me some case, which I didn't read, although I might have become better versed in the law if I had, and I said, "Tom, I haven't read the case, but you don't mean to tell me if you aren't prejudiced at all, and if you knew a particular phase after the first statement was given, and the first statement is given when a man is excited and shocked, that you wouldn't permit him to change it?"

(Testimony of John T. Holt)

He said, "I have got the law, and you better read it."

I said, "I am not going to read the case. I am not handling the case civilly," and I said, "I don't think you can get away with it. How could you possibly be prejudiced [159] if the correction in the statement was made within 24 hours?"

He said, "We are standing on the written statement."

I said, "I don't think you can get away with it, but maybe you can. That is your end of it."

He said, "I wish you wouldn't plead him guilty. I think you ought to think about it. It ought to affect your policy."

I said, "I do appreciate your co-operating with me and giving me evidence up to now but I can't go with you any further. We have come to a fork in the road. I have to protect this man's liberty and do the best I can for him. He is in a very difficult position, and it is my guess he ought to plead guilty." I said, "I think he will be in very grave danger if he does not, because a jury won't believe him if he doesn't, and if they convict him after spending the money on a trial, I think he will go to prison."

He said, "I don't think you ought to plead him."

I said, "I have to use my own judgment, and you take your end of it, and I will take care of mine." That was about the end of the conversation before the preliminary hearing.

Q. Was the case he called your attention to the case of *Valladoa v. Firemen's Fund* in 13 Cal. (2d)?

A. I can't tell you that. Tom knew it. I didn't take it down because I told him I wasn't handling the civil case. I told him, "I would surely like to read a case that would

(Testimony of John T. Holt)

say they could get out from under that that easily," and we [160] sort of argued around it.

Q. At that time what charges were pending against Mr. White?      A. Manslaughter and hit-run.

Q. Two counts of manslaughter, were there not?

A. Quite right.

Q. Wasn't there some statement made by you relative to the fact that you could make a deal with the District Attorney if he pleaded guilty on the hit and run?

A. Those weren't the exact words, but what I told him was that the District Attorney stated if he would plead guilty to hit and run, he would dismiss the manslaughter cases, and also would not oppose probation. I had discussed with Mr. Whelan, the District Attorney, that Mr. White was a man of fine reputation and of unimpeachable character. I further stated to Menzies, "One of the reasons which impelled me to plead him guilty was that oftentimes very notable people or very prominent people before a jury did not get a fair trial, that people were prejudiced against them, and I was very concerned about that."

Mr. Menzies said, "Well, when you plead guilty, you are admitting negligence."

I said, "Not at all. This is hit-run. Negligence is not one of the elements of the crime." And we discussed that. Mr. Menzies felt differently than I did about it though, I [161] will say. He said, "I think it will." I said, "I think it won't." And that is the way that was left.

That is about all I remember of the particular conversation.



(Testimony of John T. Holt)

Q. Now, you attended the arraignment and made the plea for Mr. White? A. Yes, Sir.

Q. Mr. Menzies and Mr. Clifton were there in the court room, were they, at that time?

A. Mr. Menzies was there, and there was some very quiet, nice chap from Los Angeles with him. I think he was his stenographer.

Q. Will you stand up, Mr. Clifton?

A. That is the gentleman right there.

Q. After that did you go on to the District Attorney's office, after that plea, or on that day?

A. I went to the District Attorney's office before the plea and afterwards. There was—

Q. Well, were you present there when the evidence was brought forth showing there was human flesh and blood on the car, and imprints of the male deceased's, Mr. Lee's, shirt on the car?

A. May I correct you as to the time when that was?

Q. Yes.

A. That was before the plea was entered. We were waiting [162] to proceed with the preliminary examination, and the District Attorney asked me to come to his office, and the officers were waiting there, I think Mr. Hake was there, and the experts were there, and I noticed this exhibit here, which is No. J, apparently, in this case. That was also there, but they had a little glass over it, a magnifying glass, and that all was shown to us.

Q. And the officers explained the meaning of what they had there?

A. Yes, and they didn't need to. It was a little obvious. But they did, and we had a very sane discussion about it.

(Testimony of John T. Holt)

Q. Was Mr. Menzies there with you during that time?

A. I don't want to swear to it. I don't know. He might have been. I was directing my attention very particularly to the District Attorney and these witnesses. Mr. Menzies may have been or may not. I can't state that.

Q. Well, did you relate to Mr. Menzies and discuss with Mr. Menzies after that and on that day, what these officers had shown you?

A. Yes, we discussed that.

Q. I mean, this evidence as to blood on the car?

A. Yes; yes.

Q. And the break in the pot metal and the imprint of cloth on the car? Did you discuss that with Mr. Menzies? [163]

A. Yes, and he discussed with me something before that, that an examination had been made of the brain of the man to determine whether or not there was alcohol involved. His information was, and it later proved to be correct, that one of the gentlemen from Los Angeles—I would know his name if it were repeated—

Q. Pinker?

A. That's right, Mr. Ray Pinker. He stated at this meeting with the officers, when Mr. Hake was there, that an examination had been made of the brain, I remember particularly, because the newspaper reporters were quite interested, and I asked him quite a few questions about what effect alcohol on the blood streams and on the brain would show under proper examination.

Q. Do you recollect what the showing was,—what they said it showed?

(Testimony of John T. Holt)

Mr. Lonergan: I think, your Honor, we will object to that as immaterial in this case.

Mr. Nourse: I think it is, your Honor. I didn't ask Mr. Pinker about it on that account. I will withdraw the question.

Q. By Mr. Nourse: Have you given all that you can remember that occurred there on the day of the plea of guilty as to your discussion with Mr. Menzies or with Mr. Clifton?

A. We again discussed that day the proposition that I [164] was to receive the testimony or the statement of this lady, a Mrs. Hawkins. I wanted it very badly, as I told Mr. Menzies, for the probation department, to show that actually there was no manslaughter case at all, that this was not a compromise where we had pleaded guilty to hit-run, and that a greater charge of which he was accused was dismissed for that reason, and I wanted him to know there was contributory negligence.

Q. You did get a dismissal of the manslaughter charges?

The Court: Will you read that question?

(The question was read.)

The Witness: A. Yes. I wanted to show the mitigating circumstances surrounding the whole situation.

Q. By Mr. Nourse: But you had already at that time made your deal with the District Attorney?

A. Oh, yes, yes, but the probation hearing hadn't been had, you see. That was a matter to be presented to the probation officer.

(Testimony of John T. Holt)

Q. Anything else that you remember?

A. I should correct my last statement. I know that contributory negligence is no defense to manslaughter, but I wanted the mitigating circumstances, of course, to be before the probation department.

Mr. Nourse: I wish to interrupt, your Honor, in order that I may proceed with this witness, to offer the following portion of the admission of the Home Indemnity Company. [165] I mean plaintiff's request for admissions to defendant Home Indemnity Company No. I and Exhibit A annexed to that request, which is referred to in Interrogatory No. 1, and the Home's answer to that. I wish to offer that in evidence as our next exhibit in order.

The Court: You want to read it, you mean?

Mr. Nourse: I am just going to take it up with the witness.

The Court: Just state what it is.

Mr. Nourse: Exhibit A is an answer that was tendered. I will state the substance of the admission. It is that this answer, which is Exhibit A to the request for admissions, is the answer prepared by Mr. Menzies for the signature and verification of George White, and which he, George White, refused to verify, and they have admitted that that is the answer.

The Clerk: Do you wish that to have a number, your Honor?

The Court: Yes.

The Clerk: That will be Plaintiff's Exhibit No. 12.

(The document referred to was marked Plaintiff's Exhibit No. 12, and was received in evidence.)

(Testimony of John T. Holt)

Mr. Nourse: I next offer our request for admissions, that is, the Plaintiff's request for admission No. 7 and Exhibit D annexed to that request for admission, and the Home's answer to that request, which is their answer No. 7. That is [166] the answer, your Honor, which was prepared by Mr. Menzies in the Michael Lee, et al. v. George White, et al. case, and which was tendered for the verification of George White, and which he refused to sign, in accordance with the admissions. I would like to offer that as our next exhibit in order.

The Court: Admitted.

The Clerk: That will be Plaintiff's Exhibit No. 13.

(The document referred to was marked Plaintiff's Exhibit No. 13, and was received in evidence.)

Mr. Nourse: May I, instead of taking the court's file, just use my copies in examining the witness.

The Court: Yes.

Q. By Mr. Nourse: Mr. Holt, I call your attention to what are these exhibits, namely Plaintiff's Exhibits 12 and 13, which are Exhibits A and D in this document which I am showing you here, and I will ask you to examine them.

A. Yes, I have looked at them.

Q. You remember that those are answers brought you by Mr. White, which had been delivered to him by Mr. Menzies?

A. I don't so recollect. I can see if I have them. I can see if I have the ones which were sent to me.

(Testimony of John T. Holt)

Q. Well, now, to refresh your recollection, there were two sets of answers, the ones which you prepared, and the ones which Mr. Menzies prepared.

A. Oh, yes, I remember that. [167]

Q. This is the one that denies the accident in one case, and the other is the one which denies the accident in the other.

Mr. Nourse: Excuse me, your Honor, for lowering my voice. I am explaining to the witness the allegations so that he can more readily identify the instruments.

The Witness: May I see the allegation of the complaint, Paragraph 2? I think this is what I was looking for.

Q. By Mr. Nourse: If you will refer to Exhibit C.

A. Yes, I think I remember this all right. Yes, go ahead. I think I am all right on it.

Q. You do recollect Mr. White or Mr. Menzies, I am not sure which, bringing you two answers?

A. Oh, very well. I remember that.

Q. Prior to that time, the time those were brought to you, had you had a conversation with Mr. Menzies relative to what kind of an answer Mr. White could verify?

A. Yes.

Q. Was that over the phone or personally?

A. Over the phone.

Q. Will you state the substance of that?

A. We discussed this matter of whether or not Mr. White was jeopardizing his position under the policy and I told him, "Mr. Menzies, he could not deny under all these facts, as I now believe them to be, that he had struck these people, but [168] could honestly deny that

(Testimony of John T. Holt)

he knew he had struck them. That is as far as the man could go."

Q. Then when these answers, Exhibits 12 and 13, were brought to you, did you give Mr. White any advice as to whether or not he should sign them?

A. Oh, yes, I told him not to sign them.

Q. Did you thereafter prepare answers?

A. Yes, sir.

Q. I will show you now Plaintiff's Exhibit 2. That is the document that has a "B" tab on it in the papers I am showing you, and Exhibit F, or E, rather, and it is in this record Exhibit 4. That is "F" in the document before you, and I ask you if these answers are the answers which you prepared?

A. If they are not, they are of the same substance as those I prepared.

Q. Now, you mailed the answers you prepared to Mr. Menzies? A. Yes, sir.

Q. And that was on what date?

A. May I refer to my file?

Q. Yes. A. August 23, 1946.

Q. Can you find that letter of August 23rd?

Mr. Nourse: The copy of that letter has been received in evidence here and marked Exhibit what, Mr. Luce? [169]

The Clerk: I can probably find it.

Mr. Luce: Exhibit No. 8.

(Testimony of John T. Holt)

Q. By Mr. Nourse: Exhibit 8. I am showing you the exhibit here. This is a true copy of the letter you wrote to Mr. Menzies?

A. I am looking at a true copy that is in my file rather than reading yours, if that is all right. This is my office copy.

Q. You did mail them with this letter, Plaintiff's Exhibit 8, to Mr. Menzies?

A. Under the custom of my office, I told one of my girls to do so.

Q. You dictated the letter? A. Yes, sir.

Mr. Menzies: Paul, I think that is Exhibit 4, if it is the answer.

Mr. Nourse: I called it Exhibit 4, I think, Mr. Menzies.

Mr. Menzies: I am sorry, I didn't hear you.

Q. By Mr. Nourse: Now, after mailing those back, did you have any further conversations with Mr. Menzies, or any correspondence with him?

A. Yes, sir.

Q. Which was it? A conversation?

A. I certainly had correspondence, because I have his return letter to me in my file here, if you are interested [170] in it.

Q. You are now referring to a letter which is Exhibit A to the Answer of Home Indemnity Company of New York to request of plaintiff for admissions, and Exhibit 9 in this record. Showing you this letter which is Exhibit 9 in this record, you received that reply?

A. On or about—it was shortly after August 26th. It is dated August 26, 1946.



(Testimony of John T. Holt)

Mr. Nourse: Now, I will offer this in evidence. It will be easier to find. It is a duplicate of the former one.

The Court: Of Exhibit 9?

Mr. Nourse: Yes.

The Clerk: That will be Plaintiff's Exhibit No. 14.

(The document referred to was marked Plaintiff's Exhibit No. 14, and was received in evidence.)

Mr. Menzies: What is the date of that?

Mr. Nourse: It is August 26. It is the letter you did not date when you attached it to your admissions.

Q. By Mr. Nourse: Did you reply to that?

A. I replied, if I remember correctly, by telegram. I received the letter, I believe, on the 27th, and if my memory serves me correctly I replied by means of a wire to Mr. Menzies.

Q. Is this a copy of the wire you sent in,—

A. Yes, sir.

Q. —as of that date? [171]

A. Yes, sir.

Mr. Nourse: I offer it as our next exhibit in order.

The Court: In evidence.

The Clerk: Plaintiff's Exhibit No. 15.

(The document referred to was marked Plaintiff's Exhibit No. 15, and was received in evidence.)

Mr. Nourse: I will read the wire to your Honor. May I have the letter of the 26th?

The Witness: I don't have that. The clerk has it.

Mr. Luce: It is in evidence.

Mr. Nourse: It is in evidence, yes.

The Witness: Here is a copy of it.

(Testimony of John T. Holt)

Mr. Nourse: I will read this so that your Honor will get the context. It has been read before. It is a letter to Mr. John T. Holt from Mr. Menzies under date of August 26, 1946:

"This will acknowledge receipt of your letter of August 23rd, together with the enclosures.

"I am returning herewith the original answer in Lee against White, the original answer in Fitzgerald against White, and am retaining a copy for my files.

"Please be advised that the answer in Fitzgerald against White was due on the 22nd of August.

"I take it from your letter that you are now representing Mr. White in the above-mentioned civil [172] matters.

"I gather from your letter that your client has made inconsistent statements to you as well as to us and in view of all the circumstances surrounding this matter, the Company denies liability in both of these cases."

The last exhibit offered, the telegram, is as follows:

It is addressed to Mr. Menzies, day letter, under date of August 27, 1946:

"As I have told you and written you over and over I do not and will not represent Mr. White in the civil cases. He has not made inconsistent statements to me or to you. Your behaviour is shocking in the case and borders on the unethical.

"John T. Holt, Attorney-at-law, 1115 San Diego Trust & Savings Building, San Diego, California."

Q. By Mr. Nourse: Was there any later exchange of correspondence between you and Mr. Menzies?

A. I think so. What was the date of that last telegram, please?

(Testimony of John T. Holt)

Q. The 27th.

A. I wish to correct that answer. I was confused. But there is another telegram I had sent him on August 20th. I believe that was the last communication by means of letter or wire. [173]

Q. I show a copy of a telegram. Was that sent by you to Mr. Menzies? A. Yes, sir.

Mr. Nourse: I offer it as our next exhibit in order.

The Court: Read it.

Mr. Nourse: It reads as follows:

“August 20th, 1946

“DAY LETTER

“Thomas P. Menzies,

“548 So. Spring St.,

“Los Angeles, Calif.

“As I told you I refuse to accept any responsibility in the Civil cases against George White. Mr. White is willing and has always been willing to execute truthful answers to the cases at your request. He states he has repeatedly told you that he fell asleep but that you persist in disregarding his statement. This is to put you on notice that I am not representing Mr. White in the Civil cases.”

The Clerk: That is Plaintiff's Exhibit No. 16 in evidence.

(The document referred to was marked Plaintiff's Exhibit No. 16, and was received in evidence.)

(Testimony of John T. Holt)

Q. By Mr. Nourse: Now, when the answer which Mr. White had verified, and which you had prepared and verified and sent to Mr. Menzies were returned to you, I believe with his [174] letter of the 26th?

A. I believe that's right.

Q. The 26th? A. Yes.

Q. —what was done with them?

A. They were in my office for about a day or two, and Mr. Menzies called by telephone, and I didn't talk with him, but as a result of the telephone call my secretary, Miss Shaughnessy, returned those answers to Mr. Menzies, if I am correctly informed. I should state that is based on hearsay.

Q. Based on the practice in your office and which your office records show?

A. No, that wouldn't be the practice in my office. Tom and I had gotten a little hot over the thing, and I just refused to talk to him.

Mr. Menzies: There isn't any question about that. We admit we got them back.

Mr. Nourse: You got them back?

Mr. Menzies: Oh, Yes.

Mr. Nourse: You may cross-examine.

#### Cross Examination

By Mr. Menzies:

Q. Now, Mr. Holt, with respect to your handling the matter for Mr. White, you were only handling the criminal proceeding; is that right? [175]

A. That is right Mr. Menzies.

(Testimony of John T. Holt)

Q. And when we had our first conversation in relation to the statements that Mr. White had given us, I told you he had denied to us that he ever been in an accident, didn't I?

A. Your statement was that he denied that he had hit these people.

Q. And also that he had not been involved in any traffic accident; is that right?

A. You said that is what he had stated in that first statement that was given.

Q. That is right?

A. That's right, Mr. Menzies.

Q. Then you told me that he told you, and that you had come to the conclusion that he must have been asleep and might have hit them while he was asleep, that that was the only explanation that was possible; isn't that correct?

A. That isn't quite correct. The first time we had—I want to answer your question directly. Are you talking now about the first time we talked about him falling asleep and correcting his statement?

Q. Yes. When was that? When do you recall that was?

A. It was within anywhere from three to five days after that preliminary examination.

Mr. Nourse: The preliminary examination?

The Witness: Not the preliminary; the Coroner's inquest. [176]

(Testimony of John T. Holt)

Q. By Mr. Menzies: Would this refresh your recollection: Wasn't it on or about Monday, the 29th of July?

A. No, we talked—wait a minute. Let me take a look here.

Q. It was on the long distance telephone?

A. I talked to you at the U. S. Grant before that about it.

Q. When?

A. Within the next day or two, I think. You were up and down.

Q. What day was it?

A. I can't tell you, Mr. Menzies. I know it was before the preliminary examination, and a few days after the Coroner's inquest.

Q. Well, the Coroner's inquest was on the 23rd, wasn't it? A. That's correct.

Q. What day after that was it?

A. I can't possibly tell you. I don't know which day it was.

Q. Well, would this refresh your recollection, if I told you that we left San Diego the day, or, the morning following the Coroner's inquest?

A. No, it doesn't help my recollection, because I know it was sometime between the Coroner's inquest and when he [177] pleaded guilty, and I can't tell you what day. I didn't make any notation.

Q. Well, would this refresh your recollection: in the telephone conversation, and we will say it was the 29th, which was a Monday—

A. That doesn't help me, but go ahead.

Q. —there was a call, and I have forgotten whether you called me or I called you, and at that time the ques-

(Testimony of John T. Holt)

tion came up that Mr. White had intimated that he might enter a plea of guilty.

A. I didn't say anything like that. I discussed it.

Q. No. Didn't I call your attention to that fact?

A. You and I headed right into it, and we talked very pointedly about this plea of guilty, and I talked to you about his correcting this statement of falling asleep.

Q. You are positive that happened?

A. Oh, yes.

Q. Where did it happen?

A. Over the telephone.

Q. Did that conversation take place in San Diego or between Los Angeles and San Diego?

A. It couldn't have been between Los Angeles and San Diego. I was in San Diego at my telephone, and I was talking to you, and whether you were in Los Angeles or at the U. S. Grant, I can't be positive. [178]

Q. And in that conversation you told me that you weren't interested in the insurance angle of the case, and that you couldn't represent Mr. White on that line, that you had enough to do in the criminal proceeding, didn't you?

A. No, you have the two conversations mixed. That was the later conversation. I talked to you before then.

Q. Well, do you recall telling me that on or about the 29th of July on the telephone?

A. That was not what I said. When you asked me, or suggested to me that I shouldn't plead him guilty and go ahead and try this out, I said we had come to a parting of the ways, you had to protect your side of it, but I was primarily interested in this man's liberty, and was going to use my best judgment.

(Testimony of John T. Holt)

Q. And you said you were not interested in the insurance and you did not represent Mr. White in so far as the insurance was concerned?

A. Oh, that is quite right.

Q. And you did not represent him, as a matter of fact, in those insurance cases?

A. You say I did, or did not?

Q. You did not?

A. I did not, that's right.

Q. And you never did at any time?

A. Only to this extent, that I drew the answers to try [179] to protect the matters that have been referred to here.

Q. And that was all?

A. And that was all, and so stated at the time to you.

Q. Do you recall in that conversation, or a subsequent one, I am not sure which, when you inquired about Mrs. Hawkins' statement, and that I told you we would get it for you?

A. You had told me that personally, Mr. Menzies, once before the preliminary, and on the day of the preliminary, and over the telephone, and you did it, as I remember. You provided it for me.

Q. And I also told you, did I not, that Mr. White had told us that the damage to the car had occurred at the Hollywood race track?

A. That is not as I remember it. As I remember it, the statement was made that Mr. White said some damage was done to the front of his car at the Hollywood race track, but that he had not examined it. That is as I remember the statement.



(Testimony of John T. Holt)

Q. But you do remember that subject being brought up? A. Oh, yes, of course.

Q. You recall that in that conversation I told you that might be the story that he had given you, but he had given us a statement under oath denying that?

Mr. Nourse: Denying what?

Mr. Menzies: That he had been involved in an accident. [180]

The Witness: No, I don't remember that, Mr. Menzies. I remember you saying that he had stated to you that he was in no accident on the highway, so far as he knew, but we discussed the matter of falling asleep, and that it could have happened at that time.

Q. By Mr. Menzies: In that conversation isn't it a fact that I told you that he had given us a sworn statement that he had not been involved in any accident?

A. That's right, and then we discussed about him wanting to correct his statement.

Q. And I told you that he had never mentioned that to us? A. About falling asleep?

Q. Yes.

A. I am sorry, I will have to disagree with you very much on that, because I know you stated to me—

Q. You said—

Mr. Nourse: Let the witness finish his answer.

Q. By Mr. Menzies: Go ahead and finish your answer.

A. I am sorry. I didn't mean to interrupt. I should have let you finish.

Q. Go ahead. I interrupted you.

A. You told me that on the first statement that you took from him that he had not mentioned it, and I called

(Testimony of John T. Holt)

your attention to the fact that he had spoken about him correcting [181] his statement, and having told me. It was about the 24th. That is when we had a long discussion about it, you saying you were going to hold him to the written statement and—

Q. And I told you he had not told us that?

A. No, sir.

Q. You don't recall that?

A. No, sir. I recall a part of the statement. You said that was not under oath, and I said you could not do that.

Q. I told you regardless of what he told you, he was not under oath at that time, and he was under oath when he gave us the statement; do you recall that?

A. I recall this, which is a slight variation. You said at the first time he made the statement he was under oath, and the statement he made the next day was not under oath, and you were holding him to the one under oath. I said, "What difference does it make, as long as it was shortly afterwards, and the first one was made when he was suffering from shock and was excited, and how could you be prejudiced by that?" And you then cited a case to me.

Q. And I told you it destroyed any possibility of a defense there, that if he pleaded guilty to the hit and run, that that element of it would be admissible, that the plea of guilty would be admissible in the civil actions?

A. That is what you told me, and you also said it would [182] be an admission of negligence, and I said, no, it would not, because that was not an element in hit-run.

Mr. Menzies: That is all.

(Testimony of John T. Holt)

Redirect Examination

By Mr. Nourse:

Q. Just a moment, Mr. Holt. Counsel has asked you if you were appearing for Mr. White in the civil actions, he calls it in the insurance matters? A. Yes, sir.

Q. In what capacity were you acting when you told him about Mr. White's having fallen asleep and believing he had hit the people while asleep and that he wanted to correct his statement?

Mr. Menzies: Just a minute. I want to object to that on the ground it is argumentative and calls for an opinion and conclusion of the witness. That is the question the court has to decide.

The Court: Who he was representing?

Mr. Menzies: In what capacity he was representing him?

The Court: In view of the questioning so far, I think it is proper. I think it is not up to the court to determine who he was representing. Proceed.

The Witness: I was representing him in the criminal matter, and Mr. White had complained to me that he was not given the opportunity to correct his statement, and what should [183] be done about it. I said I would talk to Mr. Menzies about it, and I talked to him as I have stated.

Q. Did you talk to him on that occasion at the request of Mr. White?

A. Yes, sir. Mr. White talked to me in my office about it.

Mr. Nourse: That is all.

Mr. Menzies: That is all.

(Testimony of John T. Holt)

The Witness: May I be excused, to return to San Diego?

The Court: Certainly.

The Witness: Thank you very much.

(Witness excused.)

Mr. Nourse: That is all. Thank you for your courtesy, Mr. Menzies, in permitting me to call him out of order.

Mr. Menzies: I will call Mr. Harper.

# WILLIAM W. HARPER,

called as a witness by and on behalf of the defendant Home Indemnity Company of New York, having been first duly sworn, was examined and testified as follows:

## Direct Examination

The Clerk: Your full name, please?

The Witness: William W. Harper.

The Clerk: How do you spell your last name?

The Witness: H-a-r-p-e-r. [184]

By Mr. Menzies:

Q. What is your occupation, Mr. Harper?

A. I am a consulting physicist.

Q. What is the work of a consulting physicist?

A. In my particular case I am engaged in the application of physics and the methods of applying physics to all types of criminal and civil investigations and examinations.

(Testimony of William W. Harper)

Q. What preparatory study have you had for your profession?

A. Well, I had two years at the University of California, Los Angeles, and four years at the California Institute of Technology, at Pasadena.

Q. Were you connected with any of the police departments of this State?

A. For seven years after leaving Cal. Tech. I was connected with the Pasadena police department.

Q. And were you connected with any governmental agency?

A. For three years, during the war, I was connected with the Navy Department.

Q. In what capacity?

A. In technical investigations.

Q. Were you assigned to any particular branch of the Navy?  
A. Intelligence, yes, sir.

Q. During the time that you have been practicing your [185] profession, have you had occasion to investigate traffic accidents and damages, physical damages to automobiles?  
A. Yes, I have.

Q. Did you make an investigation of one 1942 Lincoln Zephyr sedan, with a Nevada license, at my request?

A. Yes, I did.

Q. When did you make that examination?

A. That was made on July 27, 1946.

Q. And where?  
A. In San Diego.

Q. Did you take any photographs as a result of your examination of the car?  
A. Yes, I did.

(Testimony of William W. Harper)

Q. I will show you here two photographs that have not been offered in evidence, and ask you whether or not you took those photographs.

A. Yes, I did take them.

Q. What portion of that 1942 Lincoln sedan did you take?

A. These photographs disclose deformations and scratches on the left hood of the vehicle in question.

Q. Did you also take photographs that are marked in evidence as Exhibits D, E, F, G, H and I?

A. Yes, I did.

Q. Did you take these five colored photographs or color transparencies? Do you have them here? [186]

A. Perhaps these (indicating) are the ones.

Q. Yes, they are. They are marked Exhibit K.

A. Yes.

Q. Now, assuming that that 1942 Lincoln sedan had collided with two human beings, a man and a woman, on the highway, was traveling at a speed of within the lawful limit of 40 to 50 miles an hour, and that prior to the impact there was a screeching of brakes, and a scream, that the woman was knocked approximately 50 feet, that is the body, and the man was knocked about 57 feet, that the car was then seen to pull over to the right of the road, straighten out and travel down the highway at a slower rate of speed, are you in a position to tell the court whether or not such an impact would be felt by the driver of the car?

A. Yes, I am.

Mr. Nourse: Just a moment. Your Honor, that is not the subject of expert testimony. No foundation has been laid for expert testimony on that ground. Here is a consulting physicist. He is not a neurologist, he is not

(Testimony of William W. Harper)

a doctor. He is no more qualified to say whether it would be felt or whether it would awaken him or not but if he wants, I will say a person awake in the car would feel a jolt that would do that damage. I will stipulate that, if that is the only purpose of it.

Mr. Menzies: You stipulate that a man couldn't go through that kind of an accident without knowing it? [187]

Mr. Nourse: No, I won't stipulate that, and I don't think any witness can testify to it. I object to this proffered evidence on that ground; that there is no foundation laid and it is not the subject of expert testimony. It is the very thing to be decided by the court when it hears all of the evidence as to what happened on this occasion.

Mr. Menzies: I am trying to aid the court in reaching whatever conclusion he may.

The Court: I think the physical facts are proper, that the court can hear the facts and judge this particular case. I will sustain the objection.

Q. By Mr. Menzies: Now, can you tell the court whether or not an impact, such as illustrated here in the photographs, would release any sound?

A. Yes, I can.

Q. And would it? A. Yes, it would.

Q. Can you tell the volume of that sound?

Mr. Nourse: Measured how?

Mr. Menzies: That is what I will ask him after a while.

The Court: Will you repeat that question, please?

(The question was read.)

(Testimony of William W. Harper)

The Court: I do not believe that you have enough facts to ask a hypothetical question. I think he should know the kind of a car, if he is familiar with that car, and the weight [188] of the car, and the approximate speed, and so forth. I think that ought to be in your questions on that.

Q. By Mr. Menzies: Do you know the approximate weight of a 1942 Lincoln Zephyr?

A. Yes, it is about 4100 pounds.

Q. Do you know the gauge of the metal on the left front fender of a 1942 Lincoln Zephyr, particularly the car involved in this accident?

A. It is 16-gauge, as I recall; 16-gauge.

Q. How thick is that in inches?

A. I would have to estimate it without a table available. I think it is in the vicinity of around twenty-five-thousandths, but I may be wrong by quite a bit. I am just guessing at it.

Mr. Nourse: Twenty-five-thousandths of an inch thick?

The Witness: Yes.

Q. By Mr. Menzies: Can you tell the court the approximate amount of force or energy that it would take to depress that fender such as is illustrated in the photographs there that have been offered in evidence, before you?

A. I don't quite understand your question, Mr. Menzies. Do you mean to make a deformation of the metal under laboratory conditions, or do you mean to produce this particular deformation?

Q. Under laboratory conditions, to depress it, or under [189] the conditions that existed in this case, where two



(Testimony of William W. Harper)

bodies were struck by a car traveling somewhere between 40 and 50 miles an hour.

A. I could assign a lower limit for it only. I could not give the exact value.

Q. What would be the lower value?

A. In my opinion, the force required to produce deformation like that would be at least 2,000 pounds.

Q. When you say 2,000 pounds, what do you mean by that?

A. Well, 2,000 pounds of force is 2,000 pounds of weight. I mean that if a force or a weight of 2,000 pounds acts on a fender which is rigidly held, you will begin to get deformations of the metal which will approximate the deformation on this fender.

Q. When you say 2,000 pounds, does that mean those 2,000 pounds are dropped any distance to produce that? Is it foot pounds, or what?

A. Well, weight is not energy, and it would not be foot pounds. It is the actual force acting against the fender.

Mr. Nourse: It would not be. What would it be?

The Witness: It is the actual force acting against the fender, I think I said.

Q. By Mr. Menzies: What do you mean by that?

A. Well, I think I answered that. By the force would mean the same as a weight pressing against the fender and [190] causing it to lose any shape which it happened to have prior to the test.

Q. Assuming that that object or car was traveling somewhere between 40 and 50 miles an hour and hit two human bodies, for the sake of the illustration, say weigh-

(Testimony of William W. Harper)

ing 200 pounds, what amount of energy would you expect to find had been released there?

A. May I have the question again, please?

(The question was read.)

Mr. Nourse: You mean 200 pounds each?

Mr. Menzies: A total of 200 pounds.

Mr. Nourse: Objected to as assuming facts not in evidence.

The Court: There has been no evidence of the weight of the bodies. I will permit the witness to answer and if it isn't connected up I will have to disregard the testimony. You may answer it.

The Witness: The energy of the vehicle itself at speeds between 40 and 50 miles an hour would be within the range of 250 and 350 thousand foot pounds, and the energy acquired by the bodies as a result of the impact would be in the range of from 10 to 20 thousand foot pounds if the aggregate weight was 200 pounds.

Q. By Mr. Menzies: Would any of that force or energy be transmitted to anyone operating the car? [191]

A. Necessarily so, yes, sir.

Q. In what way would that be done?

A. By direct mechanical contact. The shock resulting from the impact between the vehicle and the object or bodies in the road would be mechanically transmitted to any occupants of the vehicle.

Q. What, if anything, would occur, if you know, with the occupants of the vehicle? Would he remain stationary, or be thrown forward, or back?

A. The occupant or any object within the car would tend to maintain its motion and the sudden disturbance

(Testimony of William W. Harper)

produced by the impact would have the final result of throwing bodies or objects in the car forward.

Q. What would happen to any object struck, if you know?

A. Well, it would have—it would acquire a forward velocity and energy in the direction the car was traveling which struck it.

Q. If a car struck an object with the left side of it, would it have a tendency to cause the car to swerve one way or another?

A. Yes, it would cause the car to turn toward the corner upon which it had been struck.

Q. That would be true whether it hit a human body or hit another object? A. That is right [192]

Q. So long as that object was a movable object?

A. It would not have to be movable.

Q. Then, if you know, what would occur?

A. To what?

Q. According to the laws of gravity or motion?

A. What would occur?

The Court: I don't think the question is clear, counsel.

Mr. Menzies: To the car.

Mr. Nourse: You mean what goes up must come down?

Mr. Menzies: You are right.

Mr. Nourse: I guess we will stipulate to that.

The Court: All right. Proceed to the next question.

Q. By Mr. Menzies: What effect would a blow such as caused the damage that is illustrated in those photographs have on the direction of the car?

A. It would change the direction.

(Testimony of William W. Harper)

Q. And once the direction was changed, would there be a tendency of the car to follow that direction?

A. Yes, unless it was acted on by other forces.

Q. And when you say "other forces," what do you mean?

A. Well, a subsequent collision with some other object, either movable or fixed, or by human control.

Mr. Menzies: That is all. [193]

### Cross Examination

By Mr. Nourse:

Q. Mr. Harper, you say you were employed by Mr. Menzies to go to San Diego to examine this car?

A. Yes, sir.

Q. I take it, you were employed before the 27th?

The Court: Before what?

Q. By Mr. Nourse: Before the 27th of July, 1946?

A. Well, I believe my employment perhaps technically began on the 26th, because I left for San Diego on the 26th.

Q. Did anybody go with you?      A. My wife.

Q. I mean, anyone from the Home Indemnity?

A. No.

Q. What were your instructions?

A. To make an examination of an automobile bearing a certain license number and involved in this traffic accident.

Q. To determine what?

A. To determine the extent of the physical damage, and then at that time to determine whether or not the car had collided with some fixed object or with another vehicle, or with human beings.

(Testimony of William W. Harper)

Q. And you made the examination for that purpose?

A. Well, for those purposes.

Q. Yes, for those purposes? [194]

A. That's right.

Q. Did you have anything to do with determining whether or not the marks on the car disclose whether it was human beings, whether it was human bodies, or what?

A. I did pursue that examination for a few days subsequent to my return from San Diego and had partially completed the identification of certain human material on the car.

Q. What conclusions did you come to as to whether or not this car had hit human beings?

A. I concluded that it had.

Q. Did you conclude that from the nature of the damage to the car?

A. From the nature of the damage combined with the microscopic evidence which I found on the car.

Q. Did you report that to the Home Indemnity, your conclusion?

A. Yes, I did. I reported to Mr. Menzies.

Q. When did you make that report?

A. Well, I made a verbal report, as I recall, to Mr. Menzies a few days after I returned from San Diego.

Q. Before the 31st, anyway?

A. Before the 31st of July?

Q. Yes.

A. I don't believe so, no. I think it was subsequent to the first of August that I made even a verbal report. [195]

Q. But you did then? A. Yes.

Q. Did you make a written report? A. Yes.

(Testimony of William W. Harper)

Q. How long before your written report had you made your oral report?

A. Oh, I believe it was several weeks.

Q. Give me your best estimate of it.

A. Well, that is my estimate at this time without actually looking it up.

Mr. Nourse: Can you give me his written report, so that we can get the approximate date of his oral report?

Mr. Menzies: I think so.

Mr. Nourse: While counsel is looking for that, I will proceed, your Honor. I would like to have it though.

Mr. Menzies: I will try to find it for you, Paul.

Q. By Mr. Nourse: Now, you say that it would take about 2,000 pounds to do this damage? That was your direct testimony?

A. No, that isn't my direct testimony, I don't believe.

Mr. Nourse: I would like to have that read, your Honor. Have you got your notes?

Mr. Menzies: He didn't say "foot pounds."

The Court: Mr. Witness, what did you mean? You used the weight, 2,000 pounds. What did you mean by that? [196]

The Witness: Well, my testimony, as I recall it, was that it would be my opinion that at least 2,000 pounds of force would be required to approximate the deformation that was seen in these photographs, or the damage which I saw on the car. The actual value required to reproduce the same damage might run much higher than that. I assigned what in my opinion would be a minimum limit required to produce that.

Mr. Menzies: That was August 5th, the date of that report.

(Testimony of William W. Harper)

Q. By Mr. Nourse: All right. Now, let's assume that. How many foot pounds of energy,—how fast would a car weighing—4100 pounds, you say? A. Yes.

Q. —have to be traveling to generate 2,000 foot pounds of energy?

A. Well, a car would generate 2,000 foot pounds of energy at a very low speed. The 2,000 foot pounds of energy is not 2,000 pounds of force.

Q. All right. Was it 2,000 pounds of force that you were talking about— A. I am talking about—

Q. —that caused this deformation?

A. I am talking about a static load, you might say, of 2,000 pounds, being the minimum required to produce the approximate deformation of this type. That is not energy. [197]

Q. 2,000 pounds of what? Energy or—

A. 2,000 pounds of force.

Q. What is the difference between force and energy?

A. Well, there is a great deal of difference. Energy involves weight or force as a factor. Force is best defined by Newton's laws of motion.

Q. That is foot pounds, then, isn't it?

A. Force?

Q. Yes.

A. No, force is pounds. Energy is foot pounds.

Q. Well, if I put a 10-pound weight on here, what have I got? A. You have 10 pounds of force.

Q. Just resting on there? A. That's right.

(Testimony of William W. Harper)

Q. So that you think that 2,000 pounds, or, that it would take 2,000 pounds resting on that fender to distort it?

A. Well, to that approximate degree, yes. That would be a static type of test.

Q. Now, how far would you have to drop a 100-pound weight on to there to get that same amount of force?

A. Twenty feet.

Q. Twenty feet. So that if you had something that collided—if that car was traveling, then a car would have to be traveling how fast, a car weighing 4100 pounds would [198] have to be going how fast to cause that damage if it hit something weight 100 pounds?

A. Well, you mean a pedestrian, in other words, something that is on the surface of the ground, the earth?

Q. Yes, only attached by gravity to the ground.

A. In my opinion, it would take velocities between 40 and 60 miles of the vehicle to produce that damage with a collision with a pedestrian.

Q. I did not ask that. I asked you how much it would take to produce 2,000 pounds of force.

A. Well, you can't relate—

Q. You mean—

Mr. Menzies: Just let him finish his answer.

The Witness: You can't relate energy of a vehicle in foot pounds to a 2,000-pound force. It is like equating apples to bananas. They are two different things.

Q. By Mr. Nourse: Then there is no way you can determine how fast the vehicle was going to cause a force of 2,000 pounds when it hits an object weighing 100 pounds?

A. Well, not along that route, you can't, no.



(Testimony of William W. Harper)

Q. Now, when you say that this would cause the vehicle to turn to the left when it is hit on the left front fender, that would depend a great deal, would it not, upon the mass of the object it hit?

A. Well, the extent of the turn would depend upon the [199] mass, but the turn would be to the left, and the greater the bulk or mass of the object struck and the greater the dimensions of the vehicle, of course, the greater the magnitude of the turn would be.

Q. Also, it would depend upon the rigidity of the front of that vehicle, wouldn't it?

A. Well, no, I don't believe it would. I think all automobiles are sufficiently rigid and enough of one integrated piece of mechanism so that you can't say one automobile is less rigid than another from the standpoint of changing direction upon collision.

Q. That is caused then by the forcing back,—any change of direction has to be something enough to force back the left side of the car while the right-hand side goes ahead; isn't that right?

A. That is one way of looking at it. That is approximately correct, yes.

Q. So if the whole thing is a rigid frame, the tendency is far the heavier object weighing 4,000 pounds, or 4100 pounds, hitting one weighing 100 pounds, to go on along in the same direction, isn't it?

A. No; no.

Q. The component forces are there, are they not?

A. Yes, but there is a resistive force due to the 100 pound object you are speaking about, which is directed not along [200] the center, what may be the center of gravity of the car, but off to the left of it, and even though it is relatively small as compared with the for-

(Testimony of William W. Harper)

ward momentum of the car, it will, of course, cause the car to swerve or turn to the left.

Mr. Menzies: The date of that report is August 5th.

Mr. Nourse: August 5th?

Mr. Menzies: That is right.

Q. By Mr. Nourse: That was when your written report was made. So is it your memory that you made an oral report a week or two before that to Mr. Menzies? Is that right? I don't want to get you back before the accident occurred, and two weeks would take you back before it occurred.

A. No, I went down on the night of the 27th, I mean the 26th, and the day of the 27th of July, and several days passed before I had completed my laboratory examination, and I was of the opinion that another week or two had transpired before my written report was in, but whatever the date is there, that is the date.

Q. But some date before the written report you made your oral report? A. That is correct, yes.

Q. And you did advise them that, in your opinion, this car had collided with a human body?

A. That is correct, yes, sir.

Q. Did you advise them then that you thought the bodies [201] were of these two people who had been killed at Solano Beach?

A. No, I did not. I had not had an opportunity to examine the bodies of the victims or the clothing which they had worn, and I had not progressed in my investigation far enough to express an opinion that those people were the particular people involved in this collision.

Q. But you did advise them, then, prior to your written report that the nature of the indentations showed there

(Testimony of William W. Harper)

that it had not been a solid object that the car hit, didn't you? A. That is correct, yes, sir.

Mr. Menzies: That is all.

Q. By Mr. Luce: Just a question or two, Mr. Harper. When the car struck a human being or a pedestrian on the left-hand side, you say it would cause the car to deflect to the left? A. Yes.

Q. You do not mean to say it would continue on that same course until controlled by human hands, do you?

A. No, I would say it would continue on that same course until it was acted upon by some internal force.

Q. It might be acted upon by some internal force like the steering knuckles, or the wheels, or tires, or something like that? A. No. [202]

Q. It would not change the direction?

A. The only thing internal to the car that would cause the car to change direction would be someone operating the steering wheel or falling against it or touching it, doing something to change it.

Q. But suppose, Mr. Harper, you started a car down the highway with nobody in it, would you say that car would continue on that same straight course that it starts on?

A. Well, according to Newton's first law of motion, it will. It will continue on the same path until some external force operates on it. From a practical standpoint, if you start a car down a street without a driver, it is going to fall short of obeying Newton's first law of motion because there are small imperfections in the road surface, and it may hit a curb, and so it will not follow Newton's first law of motion perfectly. But that is the nature

(Testimony of William W. Harper)

of motion, for that car to continue in a straight line unless acted upon by some external force.

Q. Then what you are talking about is just pure theory, is it not?

A. Well, it is theory that has been in application to engineering work for 200 years. So if that is theory, then it is theory. But we use it in everyday engineering problems.

Q. Forgetting your theory for a moment, you know, Mr. Harper, that a car will not continue in a straight line [203] ordinarily when it is turned loose without any driver handling the wheel on any road, don't you?

A. You get it on a flat, smooth surface and I won't agree with you, because in the absence of any external forces it will continue in a straight line after its motion has been started in that direction.

Q. Well, take any highway that you ever saw or know anything about, would you say that the car would continue in a straight line?

A. No, sir, not on any average highway, it won't.

Q. It is apt to go from one side to the other?

A. Yes, it can go bouncing from one curb to another curb, or from one lamp post to another.

Q. Without any lamp posts or curb lines, it won't continue in a straight line?

A. Well, unless there are external forces, or someone changing the direction—

Q. There will be external forces acting on it without the human hand at the wheel, won't there?

A. Objects in the road, yes.

(Testimony of William W. Harper)

Q. Not the surface on the road, but just the road's contour?

A. That will; the contour of the road can introduce forces, or if the road is super-elevated.

Q. If there is only a slight elevation, isn't the effect [204] of it directed on the front tires?

A. Yes, if there is any elevation, it will affect it some, and the greater the elevation, the greater the effect the force of it will have in changing the direction of it.

Q. You wouldn't call those objects?

A. They are not obstacles, but the force that is created by the super-elevation of a road or created by a pebble or a rock is a force, an external force operating on the car.

Q. And that will cause it to change direction without a human hand on the car?

A. If they are of sufficient magnitude, the direction will change, unquestionably.

Mr. Luce: That is all.

By Mr. Nourse: Just one further question.

Q. Are you familiar with that highway there?

A. Yes, sir.

Q. That is a crowned highway, that is, the highest point of the surface is at about the center, so that water will run off both ways? A. Yes.

Q. A car left alone there, if its wheels are properly canted, will tend to go down the grade; is that right?

A. Well, I don't know what you mean by "grade."

(Testimony of William W. Harper)

Q. Well, I mean it will go down the slope. If the pavement slopes to the right, the car will tend to go to the right; [205] is that right? A. That's right, yes.

Mr. Nourse: That is all.

Mr. Menzies: That is all.

The Court: That is all.

(Witness excused.)

The Court: We will take our afternoon recess.

(A short recess was taken.)

Mr. Menzies: Your Honor, may I ask the last witness one further question?

The Court: Yes.

#### WILLIAM W. HARPER,

recalled as a witness for the defendant Home Indemnity Company of New York, having been previously sworn, was examined and testified further as follows:

#### Redirect Examination

By Mr. Menzies:

Q. Mr. Harper, Mr. Nourse asked you if a car swung to the right and there was a slight crown in the road, would it continue going that way. Assuming the car came down the highway and struck an object, and it continued to the left, would it continue on going to the left?

A. Until acted on by some external force, yes, sir.

Mr. Menzies: That is all.

Mr. Nourse: That is all.

(Witness excused.) [206]

Mr. Menzies: Dr. Parkin.

DR. VICTOR PARKIN,

called as a witness by and on behalf of the defendant Home Indemnity Company of New York, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your full name, please?

The Witness: Victor Parkin.

The Clerk: P-a-r-k-i-n?

The Witness: That's right.

By Mr. Menzies:

Q. Doctor, what is your profession?

A. Psysician and surgeon.

Q. How long have you been practicing that profession?

A. Thirty-four years.

Q. Pardon?

A. Thirty-four or thirty-five years.

Q. Have you specialized in any particular branch of medicine?

A. Yes, sir.

Q. What?

A. Mental and nervous diseases.

Q. Have you specialized in mental and nervous reactions of individuals?

A. Yes, sir. [207]

Q. Now, Doctor, assuming that an automobile weighing approximately 4100 pounds, traveling down the highway at in the neighborhood of 40 or 50 miles an hour struck two human beings, a man and a woman, with the resultant damage to the automobile as shown in Defendant's Exhibit H and Defendant's Exhibit D—

Mr. Menzies: These were not marked. I believe they were offered in evidence, your Honor. I will offer them again. Mr. Harper testified in relation to taking them.

The Court: The clerk has assigned a number to them, starting with D; D, E, F, G, H and I.

(Testimony of Dr. Victor Parkin)

Mr. Menzies: When Mr. Harper was on the stand I thought I offered them.

The Court: Yes, they were offered, and the clerk gave you a number, D, E, F, and so forth.

The Clerk: I think not, your Honor, we had photographs up to H and I, but those were not these. These are new photographs.

Mr. Nourse: What are these? I haven't seen them.

Mr. Menzies: Yes. I showed you those. They are of the hood of the car.

Mr. Menzies: I thought they were all offered, then.

The Clerk: Are they admitted, your Honor?

The Court: Yes.

The Clerk: These will be Defendant Home's Exhibits L and M. [208]

(The documents referred to were marked Defendant Home Indemnity Company Exhibits L and M, and were received in evidence.)

Q. By Mr. Menzies: (Continuing)—could you tell the court whether or not any human being driving the car who passed through a collision such as has been described to you there, and as illustrated by those exhibits, would not know he had struck an object?

Mr. Nourse: If the court please, we object to that as no foundation laid and not a matter for expert testimony.

Mr. Luce: And all the factors are not included in the hypothetical question.

The Court: That is the objection. There are not sufficient facts in the hypothetical question there, counsel.

Mr. Menzies: Very well. I will reframe it.



(Testimony of Dr. Victor Parkin)

Q. By Mr. Menzie: Doctor, assuming that a human being was driving, that is, an adult human being was driving an automobile, a 1941 Lincoln Zephyr that weighed approximately 4100 pounds, on highway 101 in a southerly direction in San Diego County, and was traveling at night at a speed somewhere between 40 and 50 miles an hour, and collided with two human beings, one a man and the other a woman, and knocked the bodies 50 feet in the case of the woman and 57 feet in the case of the man, and the car continued on its course; slowed down, pulled over slightly to the right, and proceeded to leave [209] the scene of the accident. Can you tell whether or not the driver of such a vehicle could go through such an accident without knowing he had struck a human being,—struck some human beings or objects?

Mr. Luce: We object, if the court please, on the ground no proper foundation has been laid and all the factors are not included in the question. I submit, your Honor, that it would depend a whole lot upon the condition of the driver, as to being asleep or awake, to what degree he was asleep or how the sleep had affected him, and numerous factors of that kind.

The Court: Well, that is the issue that the court has before it, and if that is the subject of the expert examination, the objection goes to the weight. I will permit him to answer. You may answer.

The Witness: I believe he could not pass through such an accident without being aware of the accident.

(Testimony of Dr. Victor Parkin)

Q. By Mr. Menzies: Upon what do you base your conclusion that he could not pass through such an accident without being aware of it?

A. Because the automobile that he was driving, having hit an object, in this case assumed to be a human being, with force sufficient to produce the deformation shown in this picture, the force would be transmitted along the car to the seat, and the individual, if he were conscious at the time, [210] would be conscious that the car had struck an object with great force.

Q. Assuming that the driver contended that he was asleep, would such an accident arouse him?

A. In my opinion, it would.

Q. Upon what do you base that opinion?

A. The amount of force; the sound. For instance, for one thing, the noise that would be created by the impact, and the transmission of the impulse to the individual would wake him up, unless he were, of course, very sound asleep or under the influence of drugs or alcohol.

Q. Assuming there was no evidence of either drugs or alcohol, Doctor, would such a blow wake the individual up and drive home the knowledge that he had been in a collision?

A. I would say it would. I have just got to take the common sense view of it, that the man was driving the car at a great rate of speed, and if he had been asleep for more than a few seconds, the car would have departed from the road, so he could not have been asleep for long, or if he were asleep, it was very, very lightly so.

Mr. Menzies: You may examine.

(Testimony of Dr. Victor Parkin)

Cross Examination

By Mr. Nourse:

Q. Doctor, in your experience you find that various individuals react differently; some react quickly and some [211] slowly, do they not? A. That is true, yes.

Q. What? A. That is correct, yes, sir.

Q. And some people fall asleep—you know people who would lie down and be asleep in no time, practically, don't you?

A. There are rare individuals who can lie down and be asleep that way, yes.

Q. And some people waken to full consciousness immediately upon a stimulus? A. They do.

Q. And others come to full consciousness more slowly? A. Correct.

Q. Sometimes it takes at least a second for people to get to full consciousness again after being asleep; is that right?

A. I think that depends upon how long they are asleep and the depth of the sleep.

Q. Well, these individuals that have fallen asleep and have lost consciousness, sometimes it takes as much as a second until they are oriented again?

A. Yes, sir.

Q. Doctor, even with many of them it will take a half a second or more to do that, will it not,—with many [212] individuals?

A. Yes, if you are asleep a space of time is necessary to awaken to full consciousness, yes.

(Testimony of Dr. Victor Parkin)

Q. If you are awakened to full consciousness by shock, such as described here, a stimulus or force, there is apt to be confusion in regaining consciousness, is there not?

A. Yes, if he is asleep, he has to re-orient himself again.

Mr. Nourse: That is all.

Q. By Mr. Luce: Doctor Parkin, you don't know how far a man might drive a car, or a car might proceed with a person asleep at the wheel in a relatively straight line, do you?

A. No, except from personal experience.

Q. Only from your own experience?

A. Yes, I do know that.

Q. But you wouldn't know as to someone else's experience?

A. How far the car might proceed whilst they are asleep without deviating from a straight line?

Q. Yes, a relatively straight line.

A. Well, I think that is just a matter of common experience and knowledge. Anyone who has driven a car knows that.

Q. Well, you couldn't be definite about it, could you?

A. No, sir; it depends upon the car, the crown of the road, the condition of the tires, and various other factors.

Q. For all you know, a person might proceed a half a [213] mile in a car in a relatively straight line and be asleep at the wheel?

A. I think that would be an extremely improbable occurrence. You might on a skating rink and a perfectly smooth surface, but just as has been explained by the witness, Mr. Harper, that Newton's law of motion enters in there and the various components of force.

(Testimony of Dr. Victor Parkin)

Q. I understood him to say that the car would proceed in a straight line.

A. So it would, if there were not any operation of an opposite force.

Q. You are not basing your last answers on your medical training and experience, are you?

A. That?

Q. Yes.

A. No, it goes back to my premedical work.

Mr. Luce: That is all.

Mr. Menzies: That is all.

The Court: That is all.

(Witness excused.)

FRED W. WILKIE,

called as a witness by and on behalf of the Home Indemnity Company of New York, having been first duly sworn, was examined and testified as follows: [214]

The Clerk: Will you state your full name, please?

The Witness: Fred W. Wilkie.

The Clerk: How do you spell Wilkie?

The Witness: W-i-l-k-i-e.

The Court: The first name is?

The Clerk: Fred W., your Honor.

By Mr. Menzies:

Q. Mr. Wilkie, what is your business or occupation?

A. Assistant probation officer of San Diego County.

Q. During the course of your official duties as assistant probation officer of San Diego County, did you have occasion to interview the defendant in this case, George White?

A. I did.

(Testimony of Fred W. Wilkie)

Q. Did you make a report of that investigation and conversation with Mr. White to the Superior Court in and for the County of San Diego?

A. The report covered the conversation and other matters taken up in the investigation.

Q. Now, do you recall when you first talked to Mr. White about his application for probation?

A. I think it was on the 6th of August, 1946, the date that he entered his plea in the Superior Court.

Q. Where did that conversation take place?

A. It took place in the San Diego County Probation Office, [215] in the Adult Division.

Q. Was anyone else present in that conversation besides yourself and Mr. White?

A. The conversation was held in a room where there are other officers, but they were merely coming and going; no one sat in on the conversation.

Q. Do you recall what Mr. White said to you and what you said to him at that time?

A. In substance, yes.

Q. Would it help you if you saw your written report, to refresh your recollection as to what transpired there?

A. I think I can recall it. The conversation covered a good many things.

Q. Just tell us what that conversation was, please.

A. In the course of the conversation I questioned Mr. White about many things.

Mr. Nourse: Just a moment.

The Court: Yes.

Mr. Nourse: I am going to object to this, your Honor, as entirely immaterial, unless counsel states that his purpose is either to impeach Mr. White, when called, which

(Testimony of Fred W. Wilkie)

it seems to me is a little out of order, or that what they are going to show is that this information was conveyed to them prior to the time they disclaimed in this matter, because any statement made by White which did not reach the defendant, Home, [216] could not possibly have misled them, and it could not possibly have any connection with his report of this accident or his co-operation with them as an insurer in this case.

Now, if counsel states that he intends to show that this was conveyed to the Home and brought to their attention, or he intends to show that White had made a misstatement through this thing, or it will impeach him, I will have no objection.

The Court: I assume that is the purpose. I can't see any other purpose. Proceed, counsel.

Q. By Mr. Menzies: Just tell us what conversation you had with Mr. White relative to the facts and circumstances surrounding an accident that occurred on or about the 20th of July, 1946, at or near Solano Beach.

A. I asked Mr. White what his recollection of the accident was. Mr. White stated that he assumed that his car, or, I should say, that his car had been definitely connected with the accident in question, and he assumed that he was, therefore, the driver of the car, so-called, and had accordingly entered a plea of guilty, but that he didn't recall any accident taking place and knew nothing of hitting anyone.

I asked Mr. White to explain, and he said that he was asleep, or that he fell asleep while driving his car, and he assumed that if he struck anyone, it happened while he was asleep. I then asked him if he had experienced

(Testimony of Fred W. Wilkie)

drowsiness or sleepiness prior to the time that he actually went to sleep, [217] and he said that he hadn't.

As I recall, I asked him what it was that woke him, and he said that he didn't know for sure what did cause him to wake up. I asked him if he heard anything that resembled a sound of something hitting the car, a thud, or something in the nature of glass breaking or hitting the pavement, or hitting the car. He said he didn't recall hearing anything like that.

I asked him how fast he was traveling just prior to falling asleep, and he said that he rarely drove fast, and that he was traveling at that time at his ordinary rate of speed, about 40 or 45 miles an hour.

I asked Mr. White what the position of his car was on the highway when he became conscious. As I recall, my question was if his car was on either shoulder of the road, or if it was straddling any of the white lines on the pavement, or just where it was situated when he became conscious. And he said it was approximately in the position that it should be normally upon the highway, or in the westerly lane of traffic heading south, that it wasn't in the center lane, or straddling any white line, but just about where it should be on the highway.

I asked him how fast he was traveling when he woke up, and he said that the car was almost at a dead halt, that it was necessary for him to shift into low gear in order to start [218] up again.

I asked him if he stopped anywhere between the scene of the accident and the time that he was stopped by the traffic officer in San Diego to discharge any passengers who might have been with him, and he said that he was traveling alone, and that he didn't discharge anyone.



(Testimony of Fred W. Wilkie)

I asked him if he had observed any of the damage on his car, or if he had noticed that the left headlight was not burning, and he said that he didn't notice that, and he didn't notice any damage.

I asked him if he inspected the car or observed any damage when apprehended, or when stopped by the traffic officer, or later when he arrived at the police station, and he said that he hadn't.

As I recall, he stated that he didn't get out of the car when first stopped by the traffic officer, but that when he drew up to the police station in San Diego, he got out of the right side of the car, and the damage was on the left side; consequently, he didn't see the damage then, but he did see the officers taking the flash light pictures of the car, but he didn't examine it at that time, and actually didn't know what the extent of the damage was until he saw pictures of the car in the paper.

I don't know, but right offhand I think of nothing else concerning the accident itself. [219]

Q. Did you ask him anything about the damage to the front end of the car, as to where that occurred?

A. I asked him about a previous statement which was attributed to him, as having been made to the arresting officers, as to the damage taking place at a race track in Los Angeles, and he said that he had reference to other damage there of a minor nature, but he didn't specify what it was.

Q. Did you ask him what the damage was of a minor nature? A. As I recall, I didn't.

Q. Was anything said by you to Mr. White, in sum or substance or effect, "You know if you will tell the truth, it will be much simpler for you," or words to that

(Testimony of Fred W. Wilkie)

effect, and he told you that, "If the judge and the district attorney were right there, and they would say I would go free if I said I knew I hit people—I said, 'O.K. I hit the people,' but I was lying when I tell you that I knew I hit them"?

A. I recall something of that conversation, but that was a subsequent conversation.

Q. That was a subsequent conversation. How many conversations did you have with Mr. White?

A. I know of two definitely. I think I talked with him by phone once, but nothing important transpired.

Q. Did you have two conversations with Mr. White about the damage to his car and what occurred on the 20th at or near [220] Solano Beach?

A. On about three days before, I believe, the probation hearing—the probation hearing was August 23rd, as I recall, 1946—I asked Mr. White to come to the office at that time because I had some matters I wanted to discuss with him, and it was at that conversation that the matters came up which you have just inquired about.

Q. What brought that subject up?

Mr. Nourse: The subject now is as to the statement about the District Attorney and the Judge being there?

Mr. Menzies: Yes.

The Witness: Well, I advised Mr. White that I had completed what investigation I felt was necessary in the case in order to submit my report to the court, and told him that I couldn't personally accept his story as fully true, and I felt that he was going to run into trouble insofar as convincing the court of his statement, and in his own interest I advised him if he had any changes which he desired to make before the report was submitted, that

(Testimony of Fred W. Wilkie)

that would be the best time to do it. Mr. White replied that the statements which he had previously given were accurate and correct, to the best of his knowledge, and that he could not change them; that if he did, he would be telling a lie then, and I advised him if that were true, I wouldn't want him to change his story.

Q. Now, was your report filed with the Superior Court [221] there in San Diego County in the case of People against White? A. Yes, it was.

Q. It became a part of the record of that proceeding?

A. Yes, sir, a part of it, that is right.

Mr. Menzies: You may examine.

#### Cross Examination

By Mr. Nourse:

Q. Mr. Wilkie, isn't this the substance of what Mr. White said to you on this occasion on the 23rd, and what you said to him,—

A. On the 23rd, I don't recall that.

Q. —or, the second time that you have related here, when you called him into the office and you told him you personally could not believe his story that he had been asleep and didn't know he hit anybody, then didn't you say to him, "I think that if you told the court that you had hit them and become frightened and left, that the court would be more lenient with you than if you tell this story?" I mean the substance or effect of what you said to him, and that you then went on to say, "If that isn't the truth, you had better tell the truth about it now." Isn't that the substance of what you said to him?

A. Well, if I understand you correctly, it is, in part. I told him that I didn't, or I couldn't fully accept his

(Testimony of Fred W. Wilkie)

story and I didn't think the court would fully accept it. [222]

Q. Didn't you tell him you thought the court would be harsher with him in the sentence or on the question of probation if he maintained that story?

A. I did say that, in my opinion, the court couldn't accept it or wouldn't accept it, and in that event if the court felt that he were not telling the truth, it would perhaps be worse for him, yes.

Q. And then didn't he say, "If you brought in the District Attorney, and the Judge, and everybody, and they said, 'Well, if you say you hit these people, you will get off free,' I would tell them, 'Yes, I hit them; but I would also tell you I am telling a lie' "? Isn't that about what he said?

A. I don't recall that. He did say something about—well, let's see—that is a little bit hazy in my mind, but there was some mention made of the fact by Mr. White that regardless of who he had to make the statement to, he couldn't tell any other story than the one he had; otherwise, he would be lying.

Mr. Menzies: That is all.

Mr. Luce: That is all.

Mr. Nourse: That is all.

Mr. Menzies: May this witness be excused, your Honor?

The Court: Any objection, counsel?

(No response.) [223]

The Court: He may be excused.

(Witness excused.)

WILLARD A. RIGLEY,

called as a witness by and on behalf of the defendant Home Indemnity Company of New York, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your full name, please.

The Witness: Willard A. Rigley, R-i-g-l-e-y.

By Mr. Menzies:

Q. Mr. Rigley, what is your business or occupation?

A. Deputy sheriff, San Diego County.

Q. Directing your attention to the 20th day of July, 1946, did you have occasion to investigate an accident at Solano Beach?

A. I did.

Q. Did you observe whether or not there was a man and woman injured as a result of that accident?

A. Yes, sir.

Q. Can you give us the size and approximate weight of the woman?

A. Oh, I would say she was in the neighborhood of 118 pounds.

Q. And the man?

A. I would approximate him at about 160. [224]

Q. You didn't talk to Mr. White at any time about the accident?

A. No, sir, I didn't. I got there shortly—

Mr. Menzies: He has answered the question, I think, your Honor.

The Court: How?

Mr. Nourse: He has answered the question, I think, your Honor. He was asked if he talked to Mr. White, and he said no, and is volunteering some testimony.

(Testimony of Willard A. Rigley)

The Court: Yes.

Mr. Menzies: That is all.

Mr. Nourse: That is all.

The Court: That is all. Thank you.

Mr. Menzies: May this witness be excused?

The Court: Yes.

(Witness excused.)

RAYMOND C. COCHRAN,

called as a witness by and on behalf of the defendant Home Indemnity Company of New York, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Your full name, please?

The Witness: Raymond C. Cochran.

The Clerk: How do you spell your last name?

The Witness: C-o-c-h-r-a-n. [225]

By Mr. Menzies:

Q. Mr. Cochran, what is your business or occupation?

A. I have a service station and garage.

Q. Where? A. At Solano Beach.

Q. Do you own and operate that station?

A. Yes, sir.

Q. Directing your attention to the 20th of July, 1946, were you on duty at your station between 10:00 and 11:00 o'clock on that night?

A. I was. I was checking out. I had turned out my lights.

(Testimony of Raymond C. Cochran)

Q. Did anything unusual happen at that time?

A. I heard a squeal of brakes and I looked out the window and saw a car pull off to the right of the road, and I saw another car come through.

Q. Then what happened?

A. Then I ran outside and watched this car, as he came up.

Q. Which car? The car that had pulled to the right, or the other car?

A. The car that pulled to the right and stopped, and the car that came through.

Mr. Nourse: I will ask that the witness tell just what he saw. [226]

The Witness: The car swerved when I first saw it.

The Court: Now, there are two cars. Which car?

The Witness: This is the southbound car.

Q. By Mr. Menzies: That is the car that came through and didn't stop?

The Witness: That's right, sir.

Q. Was there anything unusual about the appearance of that car, that came through and didn't stop?

A. It had a broken headlight, the left one.

Q. Tell us what you saw the car do.

A. It almost stopped. It slowed down very slow, and just as it came even with my station it speeded up a little bit, and passed on by.

Q. You don't know who was driving that car?

A. I had no way of knowing it.

Q. Do you know what kind of a car it was?

A. Only that it was a Lincoln sedan.

Q. Do you know the color of it?

A. I couldn't tell.

(Testimony of Raymond C. Cochran)

Q. Did you later go up to the scene of the accident?

A. No, I didn't. I heard there were two people killed and I stayed away.

Mr. Menzies: That is all. You may examine.

Mr. Nourse: That is all.

The Court: That is all.

(Witness excused.) [227]

Mr. Menzies: Mr. Clifton, will you take the stand?

LIONEL E. CLIFTON,

called as a witness by and on behalf of the defendant Home Indemnity Company of New York, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: State your full name, please.

The Witness: Lionel E. Clifton, C-l-i-f-t-o-n.

The Court: What is the witness' name?

The Clerk: Lionel E. Clifton.

By Mr. Menzies:

Q. Mr. Clifton, what is your business or occupation?

A. Claim manager for the Home Indemnity Company at Los Angeles.

Q. And you were such on the 20th of July, last year?

A. Yes.

Q. You know the defendant, George White?

A. Yes, sir.

Q. I will show you here a document and ask you to examine it and tell me whether or not your signature appears thereon, and that of Mr. White, the defendant in this case.

A. Yes, sir, it does.



(Testimony of Lionel E. Clifton)

Mr. Menzies: I will offer it in evidence, if the court please, and ask that it be marked as Defendant's Exhibit next in order. [228]

The Court: Any objection?

Mr. Nourse: None.

Mr. Luce: None.

Mr. Lonergan: None.

The Court: Admitted.

The Clerk: Defendant's Exhibit N for the Home Indemnity.

(The document referred to was marked Defendant Home Indemnity Company's Exhibit N, and was received in evidence.)

Q. By Mr. Menzies: Now, Mr. Clifton, did you receive a report of an accident involving a 1942 Lincoln Zephyr sedan that was covered under your policy that has been introduced in evidence here of the Home Indemnity Company? A. Yes, sir.

Q. Wherein the assured is the Northumberland Mining Company? A. Yes, sir.

Q. After you received that report, what did you do?

A. I telephoned your office and spoke to you.

Q. And then we went to San Diego; is that right?

A. I beg your pardon?

Q. Then we went to San Diego?

A. That is correct.

Q. Do you remember what time of day or night it was that we got to San Diego? [229]

A. About 9:00 o'clock.

Q. Do you recall whether or not you saw the defendant, Mr. George White, on that night?

A. I did.

(Testimony of Lionel E. Clifton)

Q. Did he give us an oral statement as to the facts and circumstances that he contended surrounded the accident of July 20, 1946, at or near Solano Beach?

A. He did.

Q. Do you remember the sum and substance of what he told you at that time?

A. The sum and substance of his statement at that time was that he had not been in an accident, that he had not struck anyone, and that he had not known anything about the accident.

Q. Was anything said at that time as to what, if any, damage there was to the car?

A. He stated that there was some damage sustained to the automobile at the race track.

Q. Did he tell you which race track?

A. I think he said the Inglewood race track. I am confused between the two of them, but I remember now that it was the Inglewood race track, or the race track at Inglewood.

Q. Did you see him again the next day?

A. I did.

Q. And who was present at that time? [230]

A. Mr. Whitcomb, a court reporter, Mr. White; yourself, and myself.

Q. Do you know whether or not a statement was taken from Mr. White at that time in your presence?

A. One was taken.

Q. Do you know whether or not Mr. Whitcomb administered an oath to him prior to the taking of the statement?

A. He did swear him in before taking the statement.

(Testimony of Lionel E. Clifton)

Q. And that is the statement that has been introduced in evidence here, and which was attached to our reply to the plaintiff's interrogatories? A. It is.

Q. At either of those occasions did Mr. White tell you that he wanted to change his story in any way, or that he might have fallen asleep and might have hit the two people while he was asleep?

A. He did not tell me that, sir.

Q. Did he tell anyone else that was present there at that time, in your presence? A. No.

Q. Now, when was the next time that you saw Mr. White after the morning of the 23rd?

A. The 26th of July; the following Friday, in other words.

Q. Where was that? A. At your office. [231]

Q. And what transpired at that time?

A. At that time Mr. White came in and signed some legal papers at your request, signed the non-waiver agreement which has just been introduced in evidence.

Q. Will you keep your voice up, please? It is hard to hear you.

A. I beg your pardon. He did discuss with you or ask you some questions about the procedure in the criminal matter, and that took up quite a bit of time in the conversation, and then it was at that time that he mentioned that he intended to plead guilty, or stated that he might plead guilty to the charge at San Diego, and if I remember correctly, his exact words were, "I think I am going to plead guilty. I can't tell you why."

And then during that conversation Mr. White was in a bit of a hurry, because he stated he wanted to get out to the race track that afternoon, stated he had some people

(Testimony of Lionel E. Clifton)

he wanted to see out there. It was at that time, or during that time that the statement that had been taken down by Mr. Whitcomb and transcribed was handed to him, but he did not take it with him. He had it and rolled it up, and I thought he was going to take it with him, but he didn't.

Q. And that is the statement that has been introduced here, that was taken on the 23rd of July?

A. That's right. [232]

Q. Was anything said at that time in any way that he wanted to change his statement, or that he wanted to add to the statement by saying that he might have been asleep and that he might have hit the people while he was asleep, or words to that effect?

A. There was no statement by Mr. White to that effect at any time.

Q. Who else was present at that time?

A. Mr. White, Mr. Watt, yourself and myself.

Q. Now, you attended the inquest, did you not, in San Diego on the 23rd?

A. I wouldn't say that I attended the inquest. I was in the building. I heard some testimony, and at other times I was in the Coroner's office trying to see Mr. Davis, I think his name is, who was investigating the family of the deceased people, and I was anxious to get information about their people and who were the heirs of the decedents, and things like that.

Q. Did you talk to Mr. John T. Holt there?

A. I beg your pardon?

(Testimony of Lionel E. Clifton)

Q. Did you talk to Mr. John T. Holt there?

A. The only conversation I had with Mr. Holt, if any, was that after officer Cassin's testimony, I think I recommended to both you and he that we have a photograph of the Lincoln, which was used by the officers, or whoever it was [233] that testified, and that it would be a good idea to have that, and Mr. Holt, if I remember right, was the one who recommended the photographer.

Q. You never discussed this case with Mr. Holt in any way?      A. I have not.

Q. After the conversation that we had in my office between yourself, and Mr. White, and Mr. Watt, and myself, did you ever talk to Mr. White again?

A. No. I met him in the hall yesterday morning and said, "Hello." That is all.

Q. You never wrote to him?      A. No.

Q. And he never wrote to you?      A. No.

Q. Did he ever make any request to you to make any change in his statement?      A. No.

Q. He didn't address any communication direct to the company?      A. No communications at all.

Mr. Menzies: You may examine.

Mr. Nourse: It is 4:30, your Honor. It is going to take me quite a while with this witness.

The Court: We may have to have an evening session [234] because we have agreed to take the other case tomorrow afternoon and we will have to finish by that time.

(Testimony of Lionel E. Clifton)

Cross Examination

By Mr. Nourse:

Q. Mr. Clifton, when you went in to see Mr. White after you arrived at San Diego, where did you see him? Did you call him to your room?

A. I think Mr. Menzies telephoned and stated we were upstairs.

Mr. Nourse: By the way, I think it has been stated to me by counsel, and I want to get this clear, because it will save some time. There is no question but what you, Mr. Menzies, had the full authority to represent the Home in all matters in this investigation and in receiving reports in the case?

Mr. Menzies: That is correct.

The Court: The stipulation is approved.

Q. By Mr. Nourse: You went in to the Grant Hotel and called Mr. White to your room?

A. Yes.

Q. You told him then who Mr. Menzies was, that he was an attorney? A. Yes, sir.

Q. And that he was going to be Mr. White's attorney in the civil matter?

A. I don't think I used that term. [235]

Q. Well, that he, Mr. Menzies, was going to represent him in the civil matter?

A. In so many words, that would be correct, yes.

Q. And that he should then tell you or tell Mr. Menzies and you everything that he could, and that it would be confidential? A. That is right.

Q. It could not be used against him?

A. "Couldn't" did you say, or "wouldn't"?

(Testimony of Lionel E. Clifton)

Q. Could not be used against him?

A. I don't know that I stated just that to him. I did tell him we represented the Northumberland Mining Company or Mr. Haggerty, the president of that company, and, incidentally, himself, and that we were interested only in the civil matter.

Q. Didn't you tell him you represented the Home?

A. I think he knew that because Mr. Haggerty and he had had a talk earlier in the day.

Q. But you did say that he should place confidence in you and tell you everything?

A. We asked him—

Mr. Menzies: Just a minute. That is assuming a fact not in evidence and is not proper examination.

The Court: This is cross examination, counsel, and counsel can assume any facts he wants to.

The Witness: I would not put it that way, Mr. Nourse. [236]

Q. By Mr. Nourse: Well, tell us what you did say?

A. All right. We told Mr. White that we represented Mr. Haggerty. I am quite certain that we introduced ourselves as representatives of the Home Indemnity Company, that we were interested in this matter on behalf of those people and himself, and only in so far as is concerned the civil end, we were not interested in the criminal proceeding, but we would treat whatever he told us in confidence; that we asked—we would ask him that, regardless of what he had told anybody else, to tell us the truth.

Q. And the statement he made to you that night was in substance and effect the same statement that you took from him the next morning with the reporter present?

A. That's right.

(Testimony of Lionel E. Clifton)

Q. Prior to taking his statement—the statement the next morning was taken at about 11:00 o'clock, was it?

A. About 11:00.

Q. Prior to that you had made some investigation as to the accident?

A. No, we had not.

Q. You had gone—

A. I beg your pardon. Are you talking about the following morning?

Q. Yes, sir.

A. Oh, Mr. Menzies and I had gone to the California [237] Garage.

Q. And walked around the car and examined the damage to it?

A. We walked around the car and got as close as it was possible to get, because it was roped off.

Q. Your reason for having a reporter the following day was to get what for you was just a written report of the accident; is that it?

A. There was not anything unusual in a serious case for us to use a court reporter.

The Court: Well, no, strike that out. That isn't responsive.

The Witness: Will you repeat the question?

Mr. Nourse: Read the question, please.

(The question was read.)

The Witness: Yes. I am sorry.

Q. By Mr. Nourse: And to get a full record, have a full record for the future of everything that occurred that day?

A. That is right.

Q. Now, when you took the report the following day, you had examined this car, had you?

A. Yes.



(Testimony of Lionel E. Clifton)

Q. And had you then formed a conclusion as to whether or not that car had collided with something other than a solid [238] object? A. It was my—

Mr. Menzies: Object to that, if the court please, on the ground it is incompetant, irrevelant and immaterial, calls for a conclusion of the witness, and no foundation laid.

The Court: It calls for his conclusion, counsel.

Mr. Nourse: Yes, your Honor, but here, your Honor, is the representative of this corporation defendant. The question of whether or not they acted in good faith is based on what knowledge they then had. Remember, they are saying, "Here, we are misled." It goes to what knowledge they had, and when they acquired it, and it is what they did to Mr. White in questioning White. I think this goes right to the crux of the case and we have a right to show what they knew and the source they had it from, when your Honor is asked to decide whether they have been misled and imposed upon by the first statement of White.

The Court: I have no objection to what information they got, counsel, as to the statement of that, and the court will determine what the reasonable conclusions are from the information which they received, but the witness could not form a conclusion that could possibly be drawn from the information he had. That is my point. On the other hand, you may go into whatever information they got and what that showed.

Mr. Nourse: I am going to go at it in a little different [239] way, and by doing so I do not mean any disrespect to the court, but I will lead up to it a little differently.

(Testimony of Lionel E. Clifton)

Q. By Mr. Nourse: When you examined the car, you saw the condition of the car, as shown in the photographs of the car that have been introduced in evidence, did you not? I am showing you Exhibits D, H and I. There is another one that was taken of the side of the car. Here it is, Exhibit M.

A. The damage was noticeable, and I saw it.

Q. What?

A. The damage was noticeable, and I saw it.

Q. Did you see that damage that is shown by the pictures?

A. The damage on the left front fender and on the hood, yes, sir.

Q. Did you then come to the conclusion, in examining that, that damage had been caused by contact with a human body?

Mr. Menzies: Object to that, if the court please, on the ground it is incompetant, irrelevant and immaterial, calls for a conclusion and opinion, no foundation laid, and is hearsay. It is not a question of what, if any, conclusion this witness reached. The question here is whether or not this assured gave us full, fair, frank and truthful disclosure of the facts within his knowledge surrounding the accident in which he was involved. If he didn't, it is our contention that prejudice is presumed from the very giving of that statement, and it does not make any difference whether the company [240] was misled by it or not. We are placed in the position of being confronted with the very situation that the defendant here is confronted with in the event that he stuck to either one of those two stories

(Testimony of Lionel E. Clifton)

that he gave us, and the fact that we may not have known is not material.

The Court: Well, the court finds, so far as we have the testimony from the witness, that he saw a car and the left fender was in the condition that is displayed in these photographs. Suppose one of us were to see a car like that. Then the question is, would you conclude from that it hit a person. To the court that isn't possible to conclude by just looking at it. If we walk out of a building and see a car parked at the curb and the right fender is all smashed in, I don't believe you could conclude it hit a person. It may have hit a person, but you can't conclude that.

Mr. Nourse: Say the witness testifies he did reach that conclusion. Then we bring in other evidence. I can't bring all my case in here at once and must bring it in a step at a time, and I can show he followed that up and carried that out.

Your Honor hasn't read the statement taken from White yet, a question and answer statement. It was after he had made this examination. I want to see what conclusions he had come to. The question of good faith on the part of the insurance company is certainly going to be involved.

The Court: That is right. [241]

Mr. Nourse: —and that they were trying to entrap this man into a breach of the policy, so that they could attempt to walk out from liability.

The Court: That question isn't in the case at all. I wish to give you the broadest scope, but it stretches the court's credulity that a man can look at a car and say

(Testimony of Lionel E. Clifton)

whether it hit a lamp post or any other object, without any other evidence of investigation.

Mr. Nourse: You will remember you are talking to a man who deals in those investigations.

The court: That is right.

Mr. Nourse: If he did form that conclusion, even though it is erroneous, it is material here, and I don't see how your Honor can sit here and say what conclusion the witness would come to, and that is what your Honor's ruling would be based upon.

The Court: I am just trying to be realistic, Mr. Nourse. If you walk out of this building and see a car you never saw before and see a fender broken, I would not want to take your word for one moment if you told me that it hit a post, without anything else, by looking at it because I assume this damage could be caused in many ways, without any testimony, but I don't believe you can tell by just looking at the car. Another car may have caused it. I don't say that is this case at all, but I say if you have nothing but this car in front of [242] you, and you say, "I have never seen it before, I saw it by the curb and I have come to the conclusion that it was a lamp post that it hit," that would not mean anything to this court.

Mr. Nourse: Your Honor, if it was one of these corrugated lamp posts and the indentations of the lamp post showed on the car, you would not doubt it, would you?

The Court: Yes, I would. That wouldn't be enough. There might be many other instruments that are corrugated.

(Testimony of Lionel E. Clifton)

Mr. Nourse: I don't think that is the situation. I don't want to argue this way, your Honor.

The Court: I want you to argue.

Mr. Nourse: All right. That isn't quite the situation. Let's see. Here are people that have said, "We are representing you, Mr. White." That was said the night before. They go out there, and there is something about that car—I am arguing this, and it kind of spoils cross examination, but I must do it in front of the witness—there is something about that car that leads him to believe that the statement that was told him the day before is an untruth, and he goes back the next day and takes a statement down, not trying in any way to lead the witness to the truth by saying, "Here, I have noticed this about this car, and we believe from this that this was a body that was struck. Now, what about this, Mr. White?"

Now, if he did come to the conclusion, whether or not [243] your Honor would believe he could properly form it, that isn't the question, whether or not he could properly form it, but did he come to that conclusion.

The Court: You can show what was done by the company. Now, you have injected a number of factors and that is proper cross examination. What I have tried to point out is that all the circumstances of what he had in mind that could bring him to the conclusion should be shown. But all the testimony we had when I interrupted you was merely looking at a car that was roped off, and it did not mean much to the court if all he saw just the car. Now you have injected matters, and if he had all those matters called to his attention, then there is same reasonable view of the conclusion he took. I will permit that.

(Testimony of Lionel E. Clifton)

Q. By Mr. Nourse: Did you see marks on the car that you thought—I mean, stains you thought were blood?

Mr. Menzies: I object to that, if the court please, on the ground no foundation is laid, it calls for a conclusion, and on the question of whether it was human blood, it might have been an animal's.

The Court: You can reexamine him on that. I want to know if he saw something that could lead to that conclusion,, and then it is a question of the weight of it. Answer the question.

The Witness: I wouldn't say that I saw stains on the [244] car that I believed were blood at that time.

Q. By Mr. Nourse: Did you see anything on the car that led you to the conclusion that the damage to it had been caused by impact with something other than a solid object?

Mr. Menzies: Object to that, if the court please, on the ground it still calls for a conclusion and opinion of the witness, no foundation has been laid, and it is incompetent, irrelevant and immaterial.

The Court: I will permit that. That is all right. Answer it.

The Witness: It would be my conclusion, or I believed that the damage as sustained in that accident, or to that car—I beg your pardon—was not done by contact with a solid object.

Q. By Mr. Nourse: And you came to that conclusion on the morning of the 23rd, and before you examined Mr. White, or before he was examined by Mr. Menzies in your presence?

A. I would not put it just that way. I didn't come to that conclusion at that time.

(Testimony of Lionel E. Clifton)

Q. When did you reach that conclusion?

Mr. Menzies: We object to that, if the court please, on the ground it is incompetent, irrelevant and immaterial. In other words, it is our contention here that the mere giving of these false statements, the misleading statements, we were placed in the position, regardless of what our conclusions [245] might not have been, prejudicial not only to ourselves, but to the interests of Mr. White. In other words, we would be faced with a client on whom we couldn't rely.

The Court: I will hear that argument at the conclusion of the case. Proceed. You may answer.

The Witness: Will you repeat the question?

(The question was read.)

The Witness: After some further investigation had been made.

Q. By Mr. Nourse: About when?

A. Well, it would have been after the arraignment and after the plea, when we were then able to obtain same information from the experts.

Q. Now, that was on the 31st of July?

A. He was arraigned on the 31st, yes.

Q. And it was brought to your knowledge, then—you were in San Diego then?

A. I was down there, yes.

Q. And it was brought to your knowledge then that human blood had been found on the car, and that the marks which compared with the shirt upon one of the deceaseds, Mr. Lee, had been found on the car; is that right?

A. It was after the plea had been entered that we found that out, yes, sir.

(Testimony of Lionel E. Clifton)

Q. On the 31st? [246]

A. Wait a minute. We had a lot of conversation that day and there was information to that effect.

Q. You discussed that with Mr. Menzies?

A. Yes.

Q. Also, that the experts had fitted the pieces of the headlight found on the pavement to the portions that remained on the car?

A. I believe it was that date we got some information to that effect.

Q. Now, was it then you came to the conclusion that it was the White car that had struck and killed these two people, or the car that you insured?

Mr. Menzies: We object to that on the ground it calls for a conclusion and opinion of the witness, incompetent, irrelevant and immaterial, and is hearsay.

The Court: I will permit him to answer.

The Witness: I beg your pardon?

The Court: You may answer.

The Witness: May I have the question again?

(Question read.)

The Witness: The car that we had—apparently, the car that we insured.

Q. By Mr. Nourse: You came to that conclusion then?

A. That that automobile apparently was the automobile involved. [247]

Q. You went to San Diego knowing that Mr. White was going to plead guilty?

A. I don't think I did. I did not know that.



(Testimony of Lionel E. Clifton)

Q. You knew—

A. Other than a conversation on the 26th, when he said, "I think I am going to plead guilty. But I can't tell you why."

Q. Didn't you and Mr. Menzies travel down there together, to San Diego that day? A. No.

Q. How? A. No.

Q. You went separately? A. Yes.

Q. Did you discuss with Mr. Menzies the conversation which he had had with Mr. Holt relative to the entry of a plea of guilty?

A. I met Mr. Menzies down there that morning, but I don't particularly recall our conversation that morning. Not that I am trying to evade the issue, or anything, but—

Q. Didn't Mr. Menzies report to you that Mr. Holt had said to him, in substance, that he was going to have Mr. White plead guilty, and he was going to have him plead guilty because he thought he was going to get him off easier that way, and Menzies had told Holt it might breach the policy? Didn't [248] he discuss that with you?

A. I don't recall any conversation that day about it.

Q. Didn't he further discuss with you that Holt had told him that White had fallen asleep and asked to have a statement corrected so as to show that he had fallen asleep?

A. I think it was after that date, sir. You are talking about July 31st?

Q. Yes, I am talking about July 31st.

A. No, I don't recall that.

(Testimony of Lionel E. Clifton)

Q. Now, you did get that information though prior to the time Menzies was asked to sign—I mean, White was asked to sign the answers Mr. Menzies had prepared?

A. If I remember correctly, it was around the middle of August.

Q. Well, the middle of August would be about the 15th or 16th. The answers were taken down with the letter of the 15th. Now, was it before the answers went down there that you learned that?

A. My memory is that it was after Mr. Menzies went down with the answers.

Q. Did you know the contents of the answers were that were sent down, that they were to contain a denial?

A. I did not see them.

Q. Did you discuss the contents, that they would contain a denial of the manner in which the accident occurred, —[249] I mean, that an accident had occurred?

A. I believe Mr. Menzies did say that he was going to prepare the answers based on Mr. White's statement to him on July 23rd.

Q. At the time those answers were prepared and were sent down there, did you believe White's story that he made to you to be untrue?

A. I would say that I believed that White's story was untrue.

Q. At the time you tendered him the answers?

A. At the time Mr. Menzies took the answers down there.

Q. You didn't, however, disclaim liability then, did you?  
A. No.

(Testimony of Lionel E. Clifton)

Q. But you did disclaim as soon as Mr. White refused to verify the answers which denied the happening of the accident?

A. Mr. Menzies wrote the disclaimer of liability. Now, when he did that. I do not remember.

Q. You authorized him to do it, did you not?

A. He recommended it, and I agreed to it.

Q. And you agreed to it before he did it?

A. Yes.

Q. That was not done until after White had refused to sign the answers in which he would have denied the occurrence [250] of this accident; is that right?

A. That's right.

Q. Then was your reason for your disclaimer his refusal to sign an answer which you knew was false?

A. No.

Mr. Menzies: Just a minute. I object to that on the ground it calls for a conclusion and opinion of the witness and is incompetent, irrelevant and immaterial.

The Court: Oh, no. He may give his reason for it, counsel. That is proper. He has answered. The answer is "No."

The Witness: The disclaimer would be based on a number of things; White's apparent false statement, and his failure to sign the answer which was based on the statement and which therefore, proved that the statement was false.

Mr. Nourse: I think I will have to ask you to read that answer.

(The answer was read.)

(Testimony of Lionel E. Clifton)

Q. By Mr. Nourse: Would you have disclaimed if he had signed the answer which contained the denial of the occurrence of the accident?

Mr. Menzies: Just a minute. I object to that on the ground it is purely speculative, and calls for a conclusion and opinion of the witness.

The Court: Yes, I will sustain the objection as to what [251] he would have done under certain circumstances.

Q. By Mr. Nourse: Well, up to the time when you disclaimed, and after his refusal to verify this answer which Mr. Menzies prepared, you had no more knowledge as to the falsity of his statement to you than you had immediately before you had tendered the answers, did you?

Mr. Menzies: Object to that as argumentative, at to the form.

Mr. Nourse: It isn't argumentative, your Honor.

Mr. Menzies: That is the very question the court will have to decide.

The Court: No, as I understand it, it is just a question as to his information. The court would not know anything about it without the testimony, if he had any more information before the answers were submitted than after. That is the question.

The Witness: Would you mind reading the question?  
(The question was read.)

The Witness: I did not. Perhaps Mr. Menzies did.

Q. By Mr. Nourse: Now, when Mr. White came in on the 26th, the papers that were there to be signed were papers prepared by Mr. Menzies, I mean all of them except this one introduced into evidence,—by Mr. Menzies acting

(Testimony of Lionel E. Clifton)

as attorney for Mr. White, were they not, all having to do with the defense of the actions in the State Court? [252]

A. I would say that they were prepared by Mr. Menzies, as attorney for the Home Indemnity Company, and Mr. White.

Q. And Mr. White asked his advice as to whether he should sign those, did he not? A. He did.

Q. He asked the same advice, as to whether or not he should sign the reservation of rights, did he not?

A. He did.

Q. Now, did you state to Mr. White, or did any one state to Mr. White in your presence at the time this so-called reservation of rights was signed, Exhibit—

The Clerk: N.

Q. By Mr. Nourse:—N?

The Witness: May I have that again, please?

(The question was read.)

Q. By Mr. Nourse:—Exhibit N, that there had been any breach by him of any of the conditions of the policy?

A. Repeat that all for me again, please.

(The question was read.)

A. No.

Q. By Mr. Nourse: Did you then believe that there had been any failure on Mr. White's part to co-operate?

A. Yes.

Q. What? A. Yes. [253]

Q. In what did you then believe he had failed to co-operate?

A. Well, the facts seemed to speak for themselves. Mr. White gave as his statement that he had not been involved in an accident, didn't know anything about an

(Testimony of Lionel E. Clifton)

accident; he is arrested on the charge of manslaughter and the failure to stop after an accident, and he is put on a large amount of bail. I would say that the non-waiver agreement was taken as a precautionary measure. Somebody was obviously wrong there.

Q. But I asked you if you believed, then believed that he had failed to co-operate, and you said, "Yes." I asked you in what you then believed he had failed to co-operate.

A. In the answer I just gave you.

Q. You thought he was not telling the truth?

A. I didn't think the facts—

The Court: No; no. Answer the question.

The Witness: I doubted the truth of some of his statements, yes.

Q. By Mr. Nourse: Did you so advise him?

A. I don't think I did. We had previously asked him to tell us the truth.

Q. That was at the first meeting?

A. At the first meeting, and the next morning he was taken in and sworn in before his statement was taken.

Q. Now, between the 23rd of July and the 26th, hadn't [254] you learned any further facts relative to the happening of the accident? A. Oh, yes.

Q. And what were those?

A. Well, on the 24th Mr. Menzies and I left San Diego. Mr. Menzies left me at Solano Beach. At Solano Beach I questioned Mr. Cochran with a court reporter. I wanted to question Mr. Terrill, but he didn't want to talk to me. I questioned Mrs. Hawkins. I went over the scene of the accident and wanted to get some information about the lighting conditions there, and particularly found

(Testimony of Lionel E. Clifton)

out that the light in front of the cafe was not lit. Also, I wanted to try to get some information about the people and their apparent condition. I remember distinctly Mrs. Hawkins' testimony in that respect.

Then quite a bit of time was taken in trying to locate the Mrs. Gagen, I think it is, or Miss Gagen, who was the waitress at the drive-in restaurant in San Clemente at which Mr. White had told us he had stopped and had some coffee on his way down to San Diego the night of the accident.

Q. Did you talk to Mr. Hawkins, too?

A. Mr. Hawkins?

Q. Yes. A. I think I did.

Q. You had then learned what his statements were as to [255] the approximate point of impact, the actions of the car afterwards when it drove down the highway, and you had Mr. Cochran's version, as given here in court today, had you not? A. Repeat that, please.

Q. I will reframe the question. You learned then between the 23rd and 26th from Mr. Cochran and Mr. and Mrs. Hawkins all they have testified to here in this trial,—right? A. I talked to them, yes.

Q. You also learned that on the 23rd, as one of the officers there testified, as to seeing blood on the car, did you not?

A. I think Mr. Menzies told me one of the officers saw some marks on the car which he believed was blood.

Q. And he found pieces of what he believed to be human flesh?

A. I believe Mr. Menzies told me that.

(Testimony of Lionel E. Clifton)

Q. And that he found marks on there of what looked like the marks of clothing?

A. I don't remember that part.

Q. You don't remember that part?

A. No, sir, I don't.

Q. Well, did you on the 26th advise Mr. White, when you asked him to sign this reservation of rights, that you thought he had told you an untruth and asked him for and further [256] details?

A. I didn't have very much conversation with Mr. White that day. Mr. Menzies and he did most of the talking.

Q. Did Mr. Menzies do that in your presence?

A. Not that I remember.

Q. You knew, did you not, when you sent the answers down, or when the answers were taken down, or believed that White would refuse to sign them?

A. I didn't know whether he would sign them or not.

Q. Had you discussed that with Mr. Menzies at all?

A. I knew Mr. Menzies—I don't want to make a statement that—I want to answer your question—will you repeat it for me, please?

(The question was read.)

A. No.

Q. Was it your intention, when the answers were sent down, that if he refused to sign the answers denying that his car had struck these people, to disclaim?

Mr. Menzies: Just a minute. We object to that on the ground it is incompetent, irrelevant and immaterial.

The Court: Will you read the question?

(The question was read.)



(Testimony of Lionel E. Clifton)

The Court: That is proper. You may answer.

The Witness: I don't believe I had formed any opinion at that time. [257]

Mr. Nourse: But you did form it immediately after he refused to sign?

A. On Mr. Menzies' recommendation yes.

Q. By Mr. Nourse: Now, before going to San Diego you also took a statement, or Mr. Menzies did, from Mr. Haggerty regarding this accident?

A. He had given me one. It was a short statement.

Q. It was taken on the 22nd before you went to San Diego? A. Oh, yes.

Q. Now, at some time you got from Mr. White his policies of insurance on his car from the Standard Accident and Insurance Exchange of the Automobile Club of California?

A. I think he brought those into Mr. Menzies' office on the 26th.

Q. Had you asked for them?

A. I don't remember asking for them.

Q. How? A. I don't remember asking for them.

Q. You discussed them with Mr. Menzies, didn't you?

A. I beg pardon?

Q. You had discussed them with Mr. Menzies, hadn't you?

A. We did. I think we had one particular discussion about that policy on the night of the 22nd.

Q. On the night of the 22nd? [258] A. Yes.

Q. But after the policy came in, you examined it? You examined the Standard policy?

A. I think I did.

(Testimony of Lionel E. Clifton)

Q. And you discussed it with Mr. Menzies, didn't you?

A. I don't recall anything particularly about it, but I imagine we did. It was there.

Q. Didn't you discuss it in connection with Mr. Menzies writing a letter disclaiming liability?

A. No.

Q. How? A. No.

Q. Did he show you the letter he was going to write disclaiming liability? A. I beg your pardon?

Q. Did he show you—just a minute. Let me see the exhibit. I will use my file.

I call your attention—

Mr. Nourse: I don't know whether this is in evidence. It is the letter of August 19th. Has that been offered in evidence yet?

Mr. Luce: I don't think so, unless it is an exhibit to one of his admissions.

Mr. Nourse: It is.

Q. By Mr. Nourse: I show you a copy of a letter which [259] the admissions of the Home Indemnity Company admit was written to Mr. White under date of August 19th. Did you see and discuss that letter with Mr. Menzies before it went out? A. No.

Q. How? A. No.

Q. You knew he was going to write it?

A. He mentioned that he was going to write a disclaimer, if that is the letter you are referring to, the disclaimer letter, but I didn't see that until about three weeks ago, if I remember right. I think, Mr. Nourse, you don't realize that this case involved a lot of investigations. I was handling most of the investigations around Santa Ana,

(Testimony of Lionel E. Clifton)

over in Arizona, and other places, about the people. Mr. Menzies was handling the other end of it entirely.

Q. In other words, as claims manager it was a part of your duties to decide on whether you should take reservation of rights or disclaim, but you delegated those to the attorney for the company?

A. Oh, more or less delegated those in this case to Mr. Menzies.

Q. On what date did you complete your investigation?

A. I don't think it is completed yet, sir.

Q. You are still investigating?

A. I beg pardon? [260]

Q. You are still investigating? A. Yes.

Mr. Nourse: That is all.

### Redirect Examination

By Mr. Menzies:

Q. Mr. Clifton, Mr. White didn't tell you that you would have to test the veracity of his statements, did he?

A. I didn't quite understand you, Tom.

Q. Mr. White didn't tell you at that time that you would have to test the veracity of his statements?

A. Wait a minute. Please read that.

(The question was read.)

A. No, he didn't.

Q. And he didn't tell you you would have to look out for them, did he? A. No.

Q. And when you first talked to him, did you tell him that you wanted to know the truth, regardless of what he had told the officers? A. That's right.

Q. And you relied on that statement?

A. I beg pardon?

(Testimony of Lionel E. Clifton)

Q. You relied on that statement?

A. I think we did.

Q. And you caused an investigation to be made to [261] determine whether or not that statement was true, didn't you?

A. We did.

Mr. Menzies: That is all.

Mr. Nourse: Just one further question, if I may ask it.

The Court: About how many more witnesses have you, Mr. Menzies?

Mr. Menzies: I think one short witness, unless counsel will stipulate that Mr. White was under oath.

Mr. Nourse: I am not through with Mr. Clifton yet, your Honor.

The Court: Oh, I am sorry.

Mr. Nourse: I said I had another question.

The Court: Yes.

#### Recross Examination

By Mr. Nourse:

Q. Mr. Clifton, I neglected to ask you: Sometime in the middle of August, you are not sure of the date, it was brought to your attention that Mr. White had stated that he had fallen asleep and that the accident might have occurred then: is that right?

A. That same to me from Mr. Menzies.

Q. Yes.

A. Yes, 'sir. And I understand it came to Mr. Menzies from Mr. Holt, and I understand that it came to Mr. Holt from Mr. White, although I know nothing about it. [262]

Q. It was also brought to your attention that he refused to sign the answers which Mr. Menzies had proffer-

(Testimony of Lionel E. Clifton)

ed—I forget their exhibit numbers here now, but the two that were not signed, because he said they were untrue in their denial of the occurrence of the accident?

Mr. Menzies: If the court please, there is no issue on that. We admitted that in our answer to the interrogatories. I believe there are admissions there, and it is in evidence.

The Court: I take it that is all counsel wants, if that is stipulated.

Mr. Nourse: All right. That it is stipulated that before this disclaimer was made, you knew that White would not sign the answers denying that his car had caused the collision?

Mr. Menzies: No.

The Court: All right. Then ask the question.

Mr. Nourse: That is the one you left the dates out of, in answering my interrogatory.

Mr. Menzies: No, I didn't.

Mr. Nourse: Your Honor, let's see what the admissions are, because I don't want to be fooled by any stipulation.

Mr. Menzies: You would not be.

Mr. Nourse: Now, which admission do you refer to here?

Mr. Menzies: The ones which you offered in evidence, I believe, unless I misunderstood your question.

Mr. Nourse: Well, I think I can save time, your Honor, if [263] we have the question answered.

The Court: All right. Answer the question.

Mr. Nourse: Please read the question.

(The question was read.)

(Testimony of Lionel E. Clifton)

Mr. Nourse: Strike the question, and I will ask it over again.

Q. By Mr. Nourse: You knew he had refused to sign the two answers prepared by Mr. Menzies before you consented to a disclaimer, did you not?      A. Yes.

Mr. Nourse: That is all.

Mr. Menzies: That is all.

The Court: That is all.

(Witness excused.)

Mr. Menzies: Perhaps we can save some time here. My deposition was taken, and I am perfectly willing to offer it in evidence, and it may be considered as testimony, and it may save the court's time, and the court can read it later.

Also, may it be stipulated that Mr. White was under oath at the time he gave the statement of the 23rd?

Mr. Nourse: Certainly. I will so stipulate, that he was sworn. You have someone here to testify to it?

Mr. Menzies: I have the notary here who swore him.

Mr. Nourse: And I think you had someone testify to it already. [264]

Mr. Menzies: Is there any question by either of you gentlemen?

Mr. Loneragan: No.

Mr. Luce: No.

Mr. Nourse: And then instead of your testifying, you want to offer your deposition?

Mr. Menzies: Yes, I will offer that deposition.

Mr. Nourse: I would like to consider that for a little while, your Honor. I would like to glance over it again. It has been some days since I examined it.

Mr. Menzies: Then I can rest, your Honor, and I will do that, and that will save some of the court's time.

Mr. Lonergan: Your Honor, may the record show that I am representing Mr. Hervey here again today?

The Court: Yes. The record will so show, that Mr. Lonergan is representing Mr. Hervey.

Mr. Nourse: I think, your Honor, in the interests of saving time that I am willing to accept Mr. Menzies' offer that his deposition be considered in evidence as a whole, but as to other counsel, I don't know whether they have read it or not, and I don't know whether it is fair to them. They were not present at the taking of the deposition.

The Court: Mr. Luce?

Mr. Luce: I am not very familiar with the deposition, although partly so, but I have no objection to that course [265] being pursued.

The Court: All right. Mr. Lonergan?

Mr. Lonergan: I feel the same way, your Honor.

The Court: All right. It will be received.

(The deposition of Thomas P. Menzies is in words and figures as follows, to-wit:)

"In the District Court of the United States for the Southern District of California, Central Division.

Standard Accident Insurance Company of Detroit, a corporation, Plaintiff, vs. Home Indemnity Company of New York, a corporation, et al., Defendants.

No. 5729 O'C.

Deposition of Thomas P. Menzies, taken on behalf of plaintiff, at 1014 Fidelity Building, Los Angeles, California, at 3:20 o'clock p. m., Thursday, January 9, 1947, before Fred H. Quail, a Notary Public within and for the County of Los Angeles and State of California, pursuant to Stipulation.

Appearances of Counsel:

Nourse & Jones, Esqs., by Paul Nourse, Esq.,  
for plaintiff.

Thomas P. Menzies, Esq., and Harold L. Watt, Esq.,  
for defendants. [266]

"THOMAS P. MENZIES,

having been first duly sworn, deposed and testified as follows:

"Direct Examination

"By Mr. Nourse:

"Q. State your full name.

"A. Thomas P. Menzies.

"Q. You are an attorney at law?

"A. Pardon?

"Q. You are an attorney at law?

"A. Yes.

"Q. Admitted to practice when?

"A. I can't hear you.



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"Q. Admitted to practice when?

"A. 1922.

"Q. Are you on a regular retainer basis by the Home?

"A. No.

"Q. You were employed in the matter of the claim relative to this accident that happened in Solano Beach?

"A. Solano Beach?

"Q. Yes. This accident that happened at Solano Beach. When were you employed in that matter?

"A. I think Clifton called me on the 22nd of July. I think that was the date.

"Q. Now, so as to save some questions, there is not [267] going to be any question raised of your full authority to act for the Home in this matter or in all matters—

"A. No.

"Q.—whether or not they are legal or really policy matters, matters of disclaimer.

"A. Policy matters I have nothing to do with.

"Q. I mean, matters of disclaimer.

"A. Paul, so you can get this straight, there is no question but what the disclaimer was made and entered into. We are not raising any question on that, or the authority to do so.

"Q. All right. You heard Mr. Clifton's testimony as to what occurred on the night of the 22nd?

"A. Yes.

"Q. Have you any variance in your part between what he testified to and your recollection?

"A. Yes. I only have reference to matters that didn't pertain to the accident. There were some other matters

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discussed there, the subject being White's rise to fame and his fall. You are not concerned with that.

"Q. Nothing at all relevant in any way to coverage under policy or the manner or the circumstances surrounding the accident or what was done on that night or his knowledge of the damage to the car, anything that was not related to Clifton's statement; is that right? [268]

"A. I believe not. I can't remember whether we had a picture or whether we hadn't. I don't think so. I think we asked him, though, if he had seen the pictures in the paper, and I think he said he had.

"Q. That was that night?

"A. That was that night, yes.

"Q. Your recollection is definite on that?

"A. No, it is not. I won't swear to it one way or the other, because I haven't a fixed recollection on it.

"Q. Now, is your recollection as to what occurred on the 23rd, the morning of the 23rd, the same as given by Mr. Clifton?

"A. It is the same as in that transcript. I haven't read it for some weeks, and I believe that everything I heard transpired or took place there with the exception of after we had finished he said he was going over, I think, to Mr. Holt, or he had been over there all morning. That is why he was late coming in. I don't recall of anything else at this time.

"Q. You don't know whether he said he was going to Mr. Holt's or whether he had been there?

"A. No. I rather think he said he had been over there and Mr. Holt had been busy and couldn't see him, and he had to go back, and I told him that we would see him over

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at the Inquest, and he said he wasn't going. He said he didn't [269] have to go, because they couldn't make him testify, and then I got up and left and went into the other room to get washed up.

"Q. This took place in your hotel room?

"A. Yes, in the Grant Hotel.

"Q. Did you have a conversation then with Holt within the next two or three days?

"A. We had a conversation that afternoon, shortly before the Inquest while we were waiting for them to begin. Just a matter of policy, how far we should go on examining the witnesses, and that was all. In other words, whether we should bring in hearsay and everything else that they knew, and I said, "Yes, we better do that," because it was primarily a fishing expedition, anyway.

"Q. Now, after the Inquest, the following day, didn't you have another conversation with Holt?

"A. I think it was that night. I think after the Inquest I wanted to talk to him, and he said he had to get back to his office and he would get hold of me, and either I got hold of him or he got hold of me on the phone.

"Q. Do you remember the substance of that conversation?

"A. Yes. Whether we would be willing to settle the case, and I told him that I didn't know, I didn't think so, because of the fact that that one witness' statement, it looked to me like there was a pretty good case for contributory negligence, and we discussed the fact that he had recognized that this officer Hake had done a pretty good job of getting out the facts there.

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"Q. You mean that Holt had done a good job on examining Hake?

"A. Yes.

"Q. At the coroner's Inquest?

"A. Yes.

"Q. Did you talk with White again while you were in San Diego on that trip?

"A. Yes. I think that night after the Inquest. I don't remember whether it was before or after.

"Q. Were you present at any time when any pictures were shown White of the car?

"A. I don't know, to tell you the truth, whether he was shown them or whether he wasn't. I haven't any distinct recollection of it.

"Q. Did you have any conversation with Holt about what that damage showed?

"A. Yes. I said something, or Holt said—I have forgotten who brought the subject up, but one of us mentioned a dent in the car, and I told Holt that White had said the damage had been done up at the race track and that we were having the matter checked and we would check his movements down the road and would give him the benefit of any investiga- [271] tion that we made, and that we couldn't tell what the situation was until we knew what the experts would say that we knew the state had examined the car.

"Q. Did you have that investigation made at the race track?

"A. Yes.

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"Q. As to whether there was any damage to the car then?

"A. Yes.

"Q. Did you advise Holt as to the results of it?

"A. I don't remember whether I did or not, or whether I told Mr. White that, but I told one or the other of them.

"Q. What was that? What did you find out?

"A. That the car had been parked without the keys in it, and that the boys out there at the parking lot knew the car because it was out there very often, and that apparently it had been parked slightly out in front of the other cars and that they didn't pay any attention to it, because everybody had to lock their cars, and they said it would have been possible to receive damage in the park and they not know about it, and I think that was the sum and substance of what we found out there.

"Q. Give me your recollection of a conversation that occurred here on the 26th of July in which Holt—I mean, in which White and Clifton and yourself were present. No one else was present, was there? [272]

"A. Yes, Mr. Watt was here.

"Q. All right. Give me your recollection.

"A. White came in. Mr. Clifton was here, and I told him that I had a motion for change of venue, affidavit of merits, the affidavit of residence, and the demand, and I also had a non-waiver agreement, and he said it was all right to sign the affidavits, and I said, "Yes, if they are true. You better read them over, because you have to swear to them," and he said, well, what did they mean, and I said, "Well, one of them is that you were a resident and had been a resident of Los Angeles County at the time of

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the commencement of this action, and, if that is true, why, you can safely swear to it." He said, "Yes, I have lived here for three years." And I said, "The affidavit of merits is that you fully and fairly disclosed all the facts of the case to me, and I would advise you that you do have a defense, and the demand is that you are merely asking the court to move the case up here." "Why," he said, "all right." So I said, "Then there is this non-waiver agreement," and he said, "What is that?" I said, "Well, that is an agreement whereby if the company has any policy defenses or rights under the policy, that they are not waiving them by reason of investigating this accident, and that you are not waiving your rights under the policy to enforce any claims that you may have by reason of its terms," and he said, "Well, is it [273] all right for me to sign it?" And I said, "Well, that is up to you." I think Mr. Watt had come in, in the meantime, and he asked Mr. Watt about it. Harold explained to him approximately the same as I had, and he signed it. Then he said he was in a hurry, and I said, "Well, I have a copy of that sworn statement that you gave us down in San Diego, and I wish you would take time out and read it and sign it and make any corrections that you want to make in it." He said, "Well, I am going to the races." He said, "Well, let me see it," so I gave it to him. He looked at it a minute, and then he rolled it up in his hands, and he said, "Well, I have got to get out to the races." He said, "I have an appointment out there with some people that may help me." He said, "I am thinking about pleading guilty." I said, "Well, you better seek some advice on that from your own counsel because," I said, "if any difficulty arises between you and

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the Home Indemnity Company, I am their attorney, I am not yours, and I will continue to represent the Home, and you should get a competent attorney to represent you that knows something about insurance law, one that you would choose." He said, "Well, do you know anybody?" I said, "I know them, but you better choose them and," and I said, "You might talk to Mr. Haggarty. Maybe he knows somebody that will represent you." Well, he said, "What will happen if, at the preliminary examination," he said, [274] "I don't plead guilty? What will they do?" I explained the mechanics of the preliminary examination and told him what would happen, and then he said, "Well, suppose I should plead guilty?" I said, "Well, if you do, why, you will enter your plea there in the Municipal Court. You will go up and be arraigned in the Superior Court. You will waive your preliminary examination, but," I said, "if you are going to do that," I said, "I advise you to seek independent advice of your own attorney." So he said, all right, he would do that, and I said, "Well, what about this statement?" He says, "Well, I promised to meet these people out there, and they will be a big help to me, and" he said, "I have to see them because I have got to discuss with them what I am going to do," and he said, "I will look this over some time later." In the meantime, just as he left, he said that he had to get out. He wanted to know which was the quickest way to get out to Inglewood, and I told him to go down Figueroa and out. That is the sum and substance of what transpired them.

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"Q. Did he say anything to you about—you knew that Holt was acting for him then, didn't you?

"A. I knew that Holt had represented him at the preliminary.

"Q. Did he tell you—

"A. He said that he had talked to Holt—I think he [275] mentioned that here in this conversation, and I don't know whether he said he completed his arrangements or he hadn't completed them. I am not sure.

"Q. Didn't he tell you that Holt had advised him to plead guilty?

"A. Yes, I believe he did.

"Q. Didn't he tell you why?

"A. No, he didn't.

"Q. Did you tell him what effect you thought his plea of guilty would have on his rights under the policy?

"A. No, I told him it might prejudice his rights under the policy.

"Q. Did he plead guilty?

"A. That's right.

"Q. Did you tell him why?

"A. No.

"Q. Was that before or after you had him sign the reservation of rights?

"A. That was after, I believe. I don't believe he had mentioned anything about the plea.

"Q. You went with White to get his car released, didn't you, from the sheriff's garage?

"A. Yes.

"Q. I mean, the Lincoln.

"A. Yes. [276]



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“Q. Were you with him when he drove out?

“A. No.

“Q. What?

“A. I merely got the release for him.

“Q. You didn’t go to the garage?

“A. Yes, we went down there and the garage man tried to hold him for charges that he hadn’t authorized, and I told him not to pay it, and he wanted to, and I said no. I said, “It is Mr. Haggarty’s car.” I said, “Why should you pay something you don’t have to?” It was a \$10 or \$11 charge, and we left and—

“Q. You didn’t see the car, then, after that time?

“A. Pardon?

“Q. You didn’t see the car even at that time?

“A. No. The car was in the garage, and they had a little office at the front. We just went up to this wicket at the front. We saw the car was sitting in there.

“Q. Do you remember about what date that was?

“A. What date was the preliminary?

“Q. The arraignment?

“A. Yes, the arraignment.

“Q. The 31st.

“A. I think it was after that, because I think that—

“Q. It was after his plea of guilty, then?

“A. Yes, I think it was. [277]

“Q. Now, up to that time had anything been said to you about White being asleep?

“A. Yes. I think on the 29th Mr. Holt called and said that he had advised Mr. White to plead guilty, and I said, “Well, you better be sure that is the right thing to do,” and I said, “Don’t do anything that will prejudice his

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insurance,” and I said, “You know, a plea of guilty may do that.” I said, “You better give that some thought.” He said, “Well, I don’t know what else he can do,” and I said, “Well, you can do several things.” I said, “You can try out this preliminary examination. You can make them produce the facts and then determine what you want to do after you have all the facts.” He said, “Why, the District Attorney won’t stand for that.” They wanted a plea of guilty then, and if he went through a preliminary, why, they wouldn’t let him plead guilty. They would insist on the manslaughter. I said, “there is a good defense of contributory negligence there.” He said, “Well, if he takes my advice, he is going to to that.” I said, “Well, just remember that that may prejudice his insurance.” He said, “Well, just remember this conversation,” and I said I would. He says, “I am telling you now that he must have fallen asleep and he might have hit them while he was asleep.” [278]

“Q. Didn’t he say that White said that, that he had fallen asleep?

“A. He may have. I am not sure of that. Yes, I think he did, Paul, and I said, “Well, that is diametrically opposed to what he told us.” I said, “He denied to us that he was never in an automomobile accident.”

“Q. Well, now, I am going to ask you, if you will listen to me, if he didn’t say to you in substance that White had told him and that he was telling you that he had fallen asleep and he might have and believed that he had struck these people at the time he was asleep?

“A. No, he didn’t say he believed he had. He said he might have, that White had told him that he might have fallen asleep and he might have hit them.

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“Q. Didn’t he ask that that be incorporated in the report that had been made?

“A. Yes, and I told him to tell White to come up and make whatever changes he wanted to, that we had his sworn statement, and he wasn’t under oath when he was making that one.

“Q. Didn’t he tell you further that he was going to tell White to plead guilty because he didn’t believe anyone would believe White’s story, he didn’t believe a jury would, and that he would be convicted of the charges, and if he put the court to the expense of a trial—I mean, the state to [279] the expense of a trial, that the court would probably be harsher with him than if he entered a plea of guilty?

“A. Yes, I think he did say that.

“Q. That was the reason he was advising him to plead guilty?

“A. No, he said there was the additional reason, that he didn’t think he could get the consent of the District Attorney or, as he put it, I think, make a deal with the District Attorney and get out from under the manslaughter charge, and that he wasn’t concerned with the insurance angle, his job was to get him out of the criminal charge.

“Q. But didn’t he say that he didn’t believe that a jury would believe his story and—you have just said that you thought he did say this, about the expense.

“A. Yes, he did. I believe he did. I don’t have a definite recollection, but I would in fairness say, well, if he said that, why, undoubtedly he did.

“Q. Now, had White told you before that, that he had fallen asleep?

“A. No.

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"Q. What?

"A. No.

"Q. That was your first intimation?

"A. That was.

"Q. Then did you have another conversation with White [280] after that?

"A. Yes, I did.

"Q. You are talking now about a telephone conversation on the 29th, and I am asking for one after that.

"A. That's right. I think it was—when were those answers due, do you remember?

"Q. You sent the answers down—

"A. No. I mean, when were they due the first time? I got an extension of time.

"Q. I don't know.

"A. In that Fitzgerald case.

"Q. You sent the answers down with the letter on the 15th, I think. Your motion for a change of venue came up on the 12th. I call your attention to your letter of August 15th. Maybe that will help you.

"A. No, it was before that.

"Q. You are trying to fix the conversation—

"A. I am trying to fix the time. It was some time when I had my next conversation with him. That is what you asked; isn't that correct?

"Q. Yes.

"A. I am trying to fix the time when I came back. It was same time, I would say, in the first part of August. I thought I had a way of fixing the date. Let me see. If I can look at that file a minute— [281]

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“Q. These are mine.

“A. No, I don’t want that.

“Mr. Watt: Outside the record.

“(A discussion was had off the record.)

“The witness: Well, it was some time before his hearing on his application for probation, and I either was there in San Diego and filed some papers in the second case or—I think that was one where he signed the demand. I have forgotten whether I made that demand in that case and made a motion or not.

“Mr. Nourse: Q. You didn’t make any in that case?

“A. Well, it was in connection with one of those cases, and I was going into the clerk’s office, and he had come up the stairs, and I passed the time of day with him, and I said, “What are you doing here?” He says, “Oh, I have to go up to the probation officer,” and he said, “What are you doing?” I said, “I am taking care of some details here on these cases.” I said, “Well, be sure you tell him the truth. Don’t lie to him, because he will get a report to the court of whatever you tell him, and be sure you tell him the truth.” He said he would, and he went upstairs, and I went on down into the clerk’s office. He may have signed some papers in that Lee or Osborne case. I don’t recall.

“Q. Was anything then said about the accident or the [282] circumstances surrounding it?

“A. Nothing at all. That was the sum and substance of the conversation.

“Q. Did White ever personally talk with you about having fallen asleep? “A. Yes.

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"Q. When?

"A. I think it was on the 17th of August.

"Q. Whereabouts?

"A. In San Diego, when I sent the letters down there and left mine with him, he wanted to know what they were, and I said they were the answers, and I said, "There is a letter there that explains it," and I said, "You take that letter and those answers to your attorney before you sign them and, I said, "Be sure you know what you are doing, and if your attorney wants any information, why, let me know and I will be glad to let him have it." He said, "Didn't I tell you I might have fallen asleep?" And I said, "No, you didn't." He said, "Well, I should have," and I said, "You didn't." He said, "Didn't Holt tell you?" And I said, "Yes, he told me, but I was relying on your sworn statement when I prepared those answers, and if that is any different now, why, you take it to your attorney and straighten the matter out that way."

"Q. Prior to that had you had any conversation with [283] Holt about what the contents of those answers would be, that there would be a denial in those answers that the accident occurred?

"A. I think it was after that.

"Q. Maybe if you will refer to your letter—

"A. I am not sure.

"Q. The letter of August 15th.

"A. Let's see. Do you have it there? It will probably be easier.

"Q. Well, I thought I had it. You state in the second paragraph, "You will note that these answers are prepared in accordance with the sworn statement you gave me as

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attorney for the carrier of the Lincoln Zephyr sedan owned by the Northumberland Mining Company," and isn't it true that you had had a conversation with Holt a day or so before the 15th in which he said to you that White wouldn't verify an answer that denied the accident, because now that he knew of the blood being on the car and realized the damage to the car, that he believed that his car was the one that had struck these people?

"A. No, I don't think that happened until— that was on the 19th of August, I am pretty sure.

"Q. Then what was the conversation with Holt on the 19th?

"A. That was the substance of it. [284]

"Q. What I have stated?

"A. The sum and substance of it, and that we weren't prejudiced, and I told him to read that 13 Cal. (2d), 322.

"Q. You mean the Valladao case?

"A. Yes, the Valladao case.

"Q. At that time, though, no answers had been filed?

"A. No, they weren't filed. It was subsequent to that.

"Q. In one of these conversations, either the one on the 29th when you were discussing the effect of entering a plea of guilty, and he told you then that White had fallen asleep and you wanted that put in the statement, didn't you say to him that that wasn't in White's original statement, and that White had breached the policy and that you had him over a barrel?

"A. I may have.

"Q. What? "A. I may have.

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“Q. It was your intention to disclaim at the time you tendered him these answers, wasn’t it?

“A. No, it wasn’t. It was for the purpose of determining whether his first or second statement was true, and if he refused to sign them, then there was nothing else we could do but enter a disclaimer.

“Q. By “second story” you mean the story that he had [285] fallen asleep and that he might have hit them and believed he had hit them at that time?

“A. No, you are putting in “believed he had.”

“Q. Didn’t Holt say that to you?

“A. No, I don’t believe he did.

“Q. Well, after you tendered the answers, you had a conversation with Holt relative to his not verifying them?

“A. Yes.

“Q. What reason did Holt give for his not verifying them.

“A. He said that he couldn’t verify them, and that it was in the general tenor of the letter that he wrote on the 23rd.

“Q. 23rd? Do you have that letter? Well, didn’t he tell you that he couldn’t verify them because White couldn’t deny the occurrence of the accident in the face of all of the evidence there was that the Lincoln car had done the damage?

“A. No, he didn’t say that. Wait until I get that letter. Here it is.

“Q. Oh, that is the one you have admitted the truth of the statements in?

“Mr. Watt: I think we admitted that.



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“Mr. Nourse: That is attached to his answer. You have admitted the truth of those statements in there that [286] are quoted from this letter?”

“The Witness: That’s right.

“Q. I am talking now about the conversation that occurred. What reason did he give you on the phone for not verifying the original answers?”

“A. He said that they weren’t true.

“Q. What?”

“A. He said that they weren’t true and that he couldn’t sign them.

“Q. All right. What portions did he say weren’t true?”

“A. He said that they weren’t true, that they denied he was in an accident, and I told him that was the story that he had given us, and he said, “Well, do you remember what I told you?” And I said, “Yes, I do.” “He said, “Well, he has told you that he fell asleep.” I said, “No, he has never told me that.” I said, “You did, but he never did.”

“Q. That was the last of the conversation you had with Holt, wasn’t it?”

“A. I believe that is true.

“Q. When did you first learn, Tom, that blood had been found on the car? That is, human blood.

“A. I think it was after he had pleaded guilty, when all the officers and the District Attorney and Mr. Holt and the expert witness, Pinker, were in Whelan’s office. I [287] think Pinker said that he had run the tests on the car, and they ran human blood.

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“Q. Were you there—

“A. Hake said at the Inquest, he said it was blood, but you can’t tell until you run a test on it whether it is human.

“Q. Yes. At the same time, were you present when Pinker was there?

“A. Just for a few minutes.

“Q. Did you also hear then that they had found some shreds of clothing that matched those of the deceased?

“A. Well, I heard that they had a photograph, and I think I saw it that showed that the deceased—that is, that part of the man’s shirt had left an imprint on the paint on the hood.

“Q. The imprint matched the shirt?

“A. Yes. They said that. I saw the photograph.

“Q. That was about the—

“A. That was the 31st of July.

“Q. That was the 31st? “A. Yes.

“Q. Of July? “A. Yes.

“Q. Was Holt there then?

“A. Yes, I think he was. [288]

“Q. Now, Tom, didn’t he tell you at those times that the reason—I may have gone over this before, but I want to refresh your recollection now that the reason he was having the plea of guilty entered was that poor men and men of note like White never got a fair trial?

“A. No, he never said that, Paul.

“Q. And that he couldn’t get a fair trial, and that no jury would believe his story, that he had fallen asleep,

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and that he thought White would get off easier with a plea of guilty than if he went to trial and was convicted?

"A. No, he didn't say that. He did say that he thought he would get off easier, but the balance of the conversation, no.

"Q. Did he tell you that he didn't think that the jury was going to believe White and he would be convicted, and that he would get a harsher sentence?

"A. No. He said he thought the judge would be harder on him if he were convicted, and I told him I didn't think so, that I had had a long and varied experience in that, and it was a man's right to a trial, and it was a very, very exceptional case that any judge took his spite out on a defendant when he stood trial. It usually made no difference as to the punishment, and that if he brought out all the evidence, he would know exactly where he stood, and so would the court, and I said, "You can bring out in your [289] trial all your favorable evidence that may not appear in your probation report."

"Q. Well, that was your statement, but his statement was that he was advising him to plead guilty because he thought White would get off easier that way?

"A. Yes.

"Q. Did you talk with White on the 31st and did he tell you he was going to go on Holt's advice and plead guilty?"

"A. Yes.

"Q. Do you have a telegram there—let's see. We left out this one. You did receive this telegram from Holt?

"A. Yes.

"Q. The one on the 20th?"

"A. Yes.

"Mr. Nourse: I would like to have that marked.

"Mr. Watt: Isn't that already attached?

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“Mr. Nourse: That is already attached.

“Mr. Watt: To his answer to the interrogatories?

“Mr. Nourse: No, I never had seen it at the time I prepared the interrogatories.

“(The instrument in question, photostatic copy attached hereto, was marked Plaintiff’s Exhibit 1 for identification by the Notary Public.) [290]

“Mr. Nourse: Let’s see the telegram of the 27th, please?

“Q. You also received this telegram from Mr. Holt?

“A. That’s right.

“Mr. Nourse: I ask that be attached as our next exhibit in order.

“(The instrument in question, photostatic copy annexed hereto, was marked Plaintiff’s Exhibit 2 for identification by the Notary Public.)

“Mr. Nourse: Q. You referred to the letter of August 23rd. That is the one that is attached to the Home’s admissions here as Exhibit—

“A. I believe that is correct.

“Mr. Nourse: I better identify it here for the purpose of the record.

“The Witness: I believe that is correct.

“Mr. Nourse: It is the one that is—

“The Witness: On John Holt’s stationary.

“Mr. Nourse: Yes.

“The Witness: Yes, that’s it.

“Q. You received with that the answers that had been verified by White, prepared by Holt, in the two state court actions? “A. Yes.

(Deposition of Thomas P. Menzies)

"Q. What did you do with them? [291]

"A. I think that I returned them to him and told him that they weren't satisfactory. I think I have a reply. I think the reply was attached, also, the one on the 26th addressed to Holt.

"Q. Yes. You returned them with that letter?

"A. I did.

"Q. Now, the two letters referred to, the first one being the letter of August 23rd, is the Exhibit J to the plaintiff's requests of the Home for admission, and the letter of the 26th is the one, a copy of which is attached to their answer to the requests for admission, and is marked Exhibit A. Is that correct?

"A. If that is what it shows there. I don't have the record in front of me.

"Q. All right. Now, did you get those answers back again? "A. Yes.

"Q. How did you receive them?

"A. I called Mr. Holt's office and asked that he send them up when I couldn't get an extension of time in which to plead.

"Q. Who did you talk to?

"A. I believe I talked to Mr. Lonergan.

"Q. No. I mean, who did you talk to when you called and asked that the answers be sent back? [292]

"A. One of his secretaries there.

"Q. One of the secretaries? "A. Yes.

"Q. You just requested they be mailed back to you?

"A. Yes.

"Q. You filed them on the following day?

"A. Shortly thereafter they were filed.

(Deposition of Thomas P. Menzies)

“Q. Shortly after that you made your motion to withdraw?      “A. That’s right.

“Q. By the way, this information that you received from Holt and what you did learn from White as to having fallen asleep, you relayed to the company, did you?

“A. I believe I did.

“Q. There is no contention that your receipt of it wasn’t receiving notice by the company?

“A. No.

“Mr. Nourse: All right. That’s all.

“The Witness: As a matter of fact, I didn’t know Mr. Holt was representing him or not.

“Mr. Nourse: What?

“The Witness: As a matter of fact, I didn’t know whether Holt was representing him or whether he wasn’t.

“Mr. Nourse: I am not talking about Holt. I am talking about you. [293]

“The Witness: Oh, I represented them.

(Signed) Thomas P. Menzies.

“State of California, County of Los Angeles, ss.

“I, Fred H. Quail, a Notary Public within and for the County of Los Angeles and State of California, do hereby certify:

“That prior to being examined the witness whose signature is affixed to the foregoing deposition Thomas P. Menzies, was by me sworn to testify the truth, the whole truth, and nothing but the truth;

“The the said deposition was taken down by me in shorthand at the time and place therein named, and was thereafter reduced to typewriting under my direction;

(Deposition of Thomas P. Menzies)

“That when reduced to typewriting it was read by or to the said witness, who was duly informed by me of the right to make such corrections as might be necessary to render the same true and correct, and was thereupon signed by the said witness in my presence.

“I further certify that I am not interested in the event of the action.

“Witness my hand and seal this.....day of....., 19.....

-----  
Notary Public in and for the County of  
Los Angeles, State of California. [294]

(Plaintiff's Exhibits 1 and 2 attached to the foregoing deposition are in words and figures as follows, to-wit:)

“WESTERN UNION

(50) . .

“BYA2 39 DL PD = SANDIEGO CALIF 20 131P  
1946 AUG 20 PM 1 54 THOMAS P MENZIES

“548 SOUTH SPRING ST LOS A RECEIVED  
AUG 20 1946 2:15 P.M.

“AS I TOLD YOU I REFUSE TO ACCEPT ANY  
RESPONSIBILITY IN THE CIVIL CASES  
AGAINST GEORGE WHITE. MR. WHITE IS  
WILLING AND HAS ALWAYS BEEN WILLING  
TO EXECUTE TRUTHFUL ANSWERS TO THE  
CASES AT YOUR REQUEST. HE STATES HE  
HAS REPEATEDLY TOLD YOU THAT HE FELL

ASLEEP BUT THAT YOU PERSIST IN DISREGARDING HIS STATEMENT THIS IS TO PUT YOU ON NOTICE THAT I AM NOT REPRESENTING MR. WHITE IN THE CIVIL CASES =

“JOHN T HOLT.

“Pltfs. 1 for Ident.

“Fred H. Quail

“1/9/47”

“WESTERN UNION

(50) . .

“BYA 2 08 47 = SANDIEGO CALIF 27 1157A 1946  
AUG 27 PM 12 51 THOMAS P. MENZIES ATTORNEE AT LAW

“548 SOUTH SPRING ST LOS A RECEIVED  
AUG 27 1946 1:20 P.M.

“AS I HAVE TOLD YOU AND WRITTEN YOU OVER AND OVER I DO NOT AND WILL NOT REPRESENT MR WHITE IN THE CIVIL CASES. HE HAS NOT [295] MADE INCONSISTENT STATEMENTS TO ME OR TO YOU. YOUR BEHAVIOR IS SHOCKING IN THE CASE AND BORDERS ON THE UNETHICAL =

“JOHN T HOLT ATTORNEY AT LAW.

Pltfs. Ex. 2 for Ident.

“Fred H. Quail

“1/9/47”

. . . . .

The Court: The defense rests?



Mr. Menzies: Yes.

The Court: How much rebuttal will you have, Mr. Nourse?

Mr. Nourse: I don't think very much, outside of the testimony of Mr. White.

The Court: How long will that take?

Mr. Nourse: The direct examination should not take over 30 minutes.

The Court: How much time do you want to argue in the morning, gentlemen,—about a half hour apiece? I have extensive notes, but I would like a summary.

Mr. Nourse: Does your Honor want any argument on the law?

The Court: I would like just a brief argument on the law, because I am going to ask for a brief on the law from both sides. But I would like to have a general outline, just the general principles, so to speak, of the law with the citations in the oral argument, because I will read the cases very [296] carefully that you submit to me.

Mr. Menzies: I think that should be enough, your Honor.

The Court: Then we can adjourn.

Mr. Nourse: I might want a little more time on the argument. I wish to make my argument as brief as possible, but I think to develop this thing properly your Honor will realize I must develop it from two different angles. I have offered to carry the burden for the other defendants and to develop it from their angle. Then not

knowing what view the court is going to take, I will have to develop it from another angle. If your Honor has glanced at my trial memorandum, I think you will appreciate that.

Mr. Luce: Does your Honor mean half an hour for each of us or does that include all of us?

The Court: No, I mean for each.

Mr. Luce: I had in mind making a short statement, but I do not think it will take me more than 15 or 20 minutes.

The Court: The thing I have in mind is that when I have attorneys waiting for trial, I try to accommodate those attorneys as well the attorneys that are before me. If we have half an hour of direct of Mr. White, and assuming a half hour of cross examination, then you have an hour right there and that takes us to 11:00 o'clock. That means we have an hour left. I thought we could get all the arguments in in that time, but I can see that we cannot. [297]

Mr. Nourse: What if we resume at 9:30 in the morning, your Honor? Would that help?

The Court: 9:30 to 10:30 would give us the testimony of Mr. White.

Mr. Nourse: I will say this: There are some portions of this record that have to be offered here, and I would have to check that tonight. That is a matter of merely two or three minutes in offering the record. There is a short piece of testimony I could put on right now.

The Court: All right.

Mr. Nourse: Will you take the stand, Mr. Lonergan.

JOHN B. LONERGAN,

called as a witness by and on behalf of the plaintiff, in rebuttal, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Your full name, please?

The Witness: John B. Lonergan.

By Mr. Nourse:

Q. You are an attorney at law? A. Yes, sir.

Q. Admitted to practice? A. Yes, sir.

Q. You are one of the firm of attorneys of Guthrie, Lonergan and Jordan, who are attorneys for Michael Lee, et al., [298] in the State Court action against Mr. George White? A. Yes, sir.

Q. I show you this letter and ask you if it is a letter you received from Mr. Menzies. A. Yes, it is.

Mr. Nourse: I offer it—it is your letter of August 14th—as our exhibit next in order.

The Court: In evidence.

The Clerk: Plaintiff's Exhibit 17.

(The document referred to was marked Plaintiff's Exhibit 17, and was received in evidence.)

Q. By Mr. Nourse: Prior to that had you had a conversation with Mr. Menzies relative to the answers that he was preparing in behalf of Mr. White?

A. Yes, I believe I had at least two conversations with him by telephone before that. The first was shortly before the 9th, I believe, of August, and in that I talked to him. I have forgotten now if I called him or he called me, and he was in Los Angeles. I had talked to someone else—to Mr. Clifton before that, and in my con-

(Testimony of John B. Lonergan)

versation with Mr. Menzies I believe I discussed with him the matter of settlement of the obligation and the liability to the Lee children. Do you want me to go ahead?

Q. Yes, I want you to tell what he said about the answers and about his representation of White. [299]

A. I gave him a figure at this time—and this was in the conversation before the 9th—and he sort of laughed it off, and then on the morning of the 14th, he talked again, and in that conversation he said that he had prepared some answers, or an answer, rather, to our complaint, and was sending it down for signature to San Diego, and, in substance, that he didn't think that White would sign it. Later I received the letter that you introduced in evidence.

Q. Did you offer to compromise the claims of your clients with Mr. Menzies?

Mr. Menzies: Object to that on the ground it is immaterial.

The Court: I think so.

Mr. Nourse: Wait a minute, your Honor.

The Court: All right.

Mr. Nourse: I will explain one part of our position on this, because counsel says he is not going to argue it. One of the grounds given in supporting disclaimers is that in some instances that keeps the company from taking advantage of having an early opportunity to settle the claims against it. Now, if there is going to be any such claim, I offer to prove by this witness that he offered a compromise, and to compromise the claims of his clients, and that he is still willing to compromise them, and there

(Testimony of John B. Lonergan)

has been no change in his figures or his disposition so to do. [300]

Mr. Menzies: I will renew my objection, your Honor, on the ground it would be immaterial. That isn't the question involved. The question here is we were placed in the position where we didn't know what to do, whether to rely on Mr. White or whether not to, and you can't tell that until all of the evidence is in, and to offer to compromise would not be material.

Mr. Nourse: It is the opportunity to compromise. If they are not going to claim that White put them in the position where they lost the opportunity to compromise and to act upon these claims, and to act with the same benefits to themselves as they would despite any statement made, then the evidence is not material. But if they are going to claim and argue that by reason of his statements they were deprived of the opportunity to compromise, then I think this is material.

Mr. Menzies: May I suggest it isn't solely the opportunity to compromise, but the question of what is going to enter into the compromise. If counsel for the assured cannot rely upon the integrity of the statements of the assured, certainly they are handicapped in the matter of their negotiations for a settlement. I think we can stipulate with Mr. Nourse that we would not argue that we didn't have the opportunity; that is, that we weren't put in touch with the proper people with whom the settlement had to be negotiated, but how could it be settled by negotiating if counsel had no confidence [301] in the witnesses or didn't know what the facts of the case were and couldn't find out. That is the crux of the situation, not the fact that we didn't know who the counsel for the claimants

(Testimony of John B. Lonergan)

were going to be. Certainly we would not know and your offer of proof is going to fall short of showing anything of the merits of the settlement or what is going to enter into it. Certainly, the position of the insurer is what the net worth of the case shows, or what evidence would stand up, or what the real facts as to the accident were. Certainly, that would enter into any settlement.

The Court: Would you read the first part of the statement, please? Of Mr. Menzies?

(The statement referred to was read.)

The Court: That is all Mr. Nourse is asking.

Mr. Nourse: No, your Honor, because he continues his statement. He says, "Of course, we knew who Mr. Lonergan was," but I won't want them to come in later and say, "Here, if Mr. White had told us originally that he had fallen asleep and that the accident might have happened then, and that he believed he did hit them, we could have gone out and settled these cases at a very advantageous figure, and now we have lost that, because he didn't tell us that until just before the answers came in."

Now, if that is going to be their claim and argument, then certainly evidence to show that they could at the present time [302] make the same kind of a compromise they could have originally, when they first talked compromise with Mr. Lonergan, is relevant and material.

The Court: What is there in the case that could not result in a compromise? What has changed this picture in any way? The facts in the case would have to be passed on by a jury anyway?

Mr. Nourse: That is right.

(Testimony of John B. Lonergan)

The Court: That is what makes a law suit. What is there from that standpoint?

Mr. Nourse: Was your Honor asking me?

The Court: Yes.

Mr. Nourse: That I can't say, your Honor, except I could say this, that I do know the claim that has been made in these other decisions which counsel will rely on, that the court has said that where the company has been misled and has lost the early opportunity to compromise. Now, it is true here, and it will be true at the very end of this case, that Mr. White's first statements that he had not been involved in an accident were untrue; not false in the sense of wilfully untrue, but untrue.

Now, taking Mr. Menzies' deposition, for instance. I know they are going to rely on the untruth of the first statement. They are going to say, "Well, when he came back and added to that, he could have said, 'Well, I fell asleep. The [303] accident may have happened then. I believe it did happen then; the accident must have occurred then, and I can't deny it did occur.'" So much for that, but I don't want them to add, "We lost the opportunity to compromise because this was delayed." I want to show they are in the same situation as when they were initially negotiating on the 23rd. If they are not going to contend they lost any opportunity to compromise, then there is no question here.

The Court: I can't see how there is. Of course, that isn't for me to say at this time or at this point in the evidence, so you can proceed with your question.

Mr. Nourse: Will you read the question, please?

The Court: Oh, you had better reframe it. It is back there ten pages or so.

(Testimony of John B. Lonergan)

Q. By Mr. Nourse: You talked on about the 9th of August with the witness who just testified, Mr. Clifton?

A. No, I talked with Mr. Clifton on the 30th of July. I spent, according to my time card, about an hour and a half with him and a Mr. Barr of the Barr Adjustment Company.

Q. Did you discuss the matter of compromise?

A. It was mentioned and my recollection, my best recollection, is that the substance of what we said was that I would talk to my client and find out what she wanted, she being Mildred E. Taylor, the mother of the two children, and later bring it up with them. [304]

Q. Did you later submit a figure?

A. I talked to her, and in my telephone conversation with Mr. Menzies, I believe that is the first time I submitted the figure.

Q. On the 9th of August?

A. It was shortly before the 9th.

Q. It was shortly before the 9th? A. Yes.

Q. Are you and your clients of the same disposition as to the amount you would settle for now, as you were then?

Mr. Menzies: Objected to on the ground it is incompetent, irrelevant and immaterial, hearsay, and a conclusion of the witness.

The Court: If he knows, and has been authorized, he may state.



(Testimony of John B. Lonergan)

The Witness: Your Honor, to answer that I would have to say this, that I talked to Mr. Menzies again after he had—after his client, the Northumberland Mining Company, had been served with the summons and complaint, and he called me and said they had been served and would appear, and we talked settlement again. He said, “Well, we have only the secondary liability.” And I said something about, “Well, what will you give?” And my recollection is that he said just some abstract figure about what they would give, it was less than 5,000, and it was something— [305]

The Court: I don’t care about the amount. I am not interested in that.

The Witness: I see. And I said, “No,” and I can’t say—I believe it would be privileged as whether it is settleable now.

Q. By Mr. Nourse: You feel it is a privileged communication from your client to you?

A. I haven’t consulted her since I came into the court room the other day, so I don’t know.

Mr. Nourse: All right. That is all.

Mr. Menzies: No questions.

(Witness excused.)

The Court: Then we will adjourn.

Mr. Nourse: Adjourned until when, your Honor?

The Court: 9:30 tomorrow morning.

(Whereupon, at 5:40 o’clock p. m., January 21, 1947, an adjournment was taken until 9:30 o’clock a. m., Wednesday, January 22, 1947.) [306]

Los Angeles, California, Wednesday, January 22, 1947,  
9:30 A. M.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor. No. 5729-Civil.  
Standard Accident Insurance Company of Detroit v.  
Home Indemnity Company of New York, and others, for  
further court trial.

The Court: Are both sides ready?

Mr. Nourse: Ready, your Honor.

Mr. Menzies: Ready.

Mr. Luce: Yes, your Honor.

Mr. Lonergan: Ready.

Mr. Menzies: May it please the court: Before we  
proceed, may I ask to be excused at 11:30? I have a sale  
on which I would like to attend, and if there is no objec-  
tion, I would like to be excused at that time. Mr. Watt  
will be here.

The Court: That is agreeable.

Mr. Lonergan: Your Honor, may the record again  
show that I am appearing for Mr. Hervey?

The Court: The record will so show, that Mr. Loner-  
gan is appearing for Mr. Hervey.

Mr. Nourse: Your Honor please, at the expense of  
somewhat over-amplifying the record, but I think for the  
convenience of the court, I am going to offer some letters,  
most of which are already in evidence by reference to the  
[309] admission. However, I think it will make the  
record a little more readily available to the court when  
they are referred to.

It is stipulated, as I understand, gentlemen, that these  
letters were written and received by the addressees in the  
true course of mail?

Mr. Menzies: So stipulated.

Mr. Luce: So stipulated.

The Court: Mr. Lonergan?

Mr. Lonergan: So stipulated, your Honor.

Mr. Nourse: I first offer the letter from Mr. Thomas P. Menzies to Mr. George White at the Beverly Wilshire Hotel, dated August 15, 1946.

The Clerk: That will be Plaintiff's Exhibit No. 17 in evidence.

Mr. Luce: Just a minute. I think there is already a No. 17.

The Court: Yes, Exhibit 17 is the last one. That is the August 14th letter from Mr. Menzies. Isn't that your record, Mr. Cross?

Mr. Menzies: No. 17 appears to be one to Mr. Lonergan.

The Court: Just a moment.

The Clerk: Yes, your Honor, that is correct. This will be Exhibit No. 18.

(The document referred to was marked Plaintiff's Exhibit No. 18, and was received in evidence.) [310]

The Court: Proceed.

Mr. Nourse: I next offer the letter from Thomas P. Menzies to George White at the Grant Hotel, San Diego, dated August 19, 1946.

The Clerk: Plaintiff's Exhibit 19 in evidence.

(The document referred to was marked Plaintiff's Exhibit 19, and was received in evidence.)

Mr. Nourse: Next, the letter from Thomas P. Menzies to John T. Holt, dated August 19, 1946.

The Clerk: Plaintiff's Exhibit No. 20 in evidence.

(The document referred to was marked Plaintiff's Exhibit 20, and was received in evidence.)

Mr. Nourse: Next, the letter from John T. Holt to Thomas P. Menzies, dated August 23, 1946.

The Clerk: Plaintiff's Exhibit No. 21 in evidence.

(The document referred to was marked Plaintiff's Exhibit 21, and was received in evidence.)

Mr. Nourse: Next, the letter from Thomas P. Menzies to John T. Holt, dated August 26, 1946.

The Clerk: Plaintiff's Exhibit No. 22 in evidence.

(The document referred to was marked Plaintiff's Exhibit 22, and was received in evidence.)

Mr. Nourse: Those are the only ones of which I have copies, your Honor.

Mr. Luce: Mr. George White, please. [311]

# GEORGE WHITE,

one of the defendants herein, called as a witness in his own behalf, having been first duly sworn, testified as follows:

## Direct Examination

The Clerk: Your full name, please?

The Witness: George White.

Mr. Luce: Your Honor please, I will ask Mr. Nourse to examine Mr. White.

The Court: Very well.

Mr. Nourse: I don't want it to be understood, your Honor, that I am calling Mr. White as my own witness.

(Testimony of George White)

I will examine him and I will stay within the rules of direct examination so far as possible.

The Court: Very well.

By Mr. Nourse:

Q. You are one of the defendants in this action, Mr. White? A. Yes, sir.

Q. And the person who is the defendant in the State Court actions, that are described in the State Court, the actions brought against you by defendants Lee and Fitzgerald? A. Yes, sir.

Q. I show you this document, Mr. White, dated August 5, 1946, consisting of two pages, and ask if that is your signature on both the first and second pages [312]

Mr. Nourse: You have seen this, gentlemen.

Mr. Menzies: That is the one that is attached to the admissions?

Mr. Nourse: It is attached.

Q. By Mr. Nourse: This is the report to the Automobile Club, Mr. White?

A. It is the report the man took down. It looks like it. Yes, I signed that; that is my signature.

Q. That is your signature on both pages?

A. Yes, sir.

Q. Was his delivered by you to one of the adjusters for the Standard Accident Insurance Company?

A. Yes, sir.

Q. Whereabouts? In Hollywood, do you remember?

A. In San Diego. I went to both places. I delivered this in San Diego, I think.

(Testimony of George White)

Mr. Nourse: The document reads, your Honor:

"August 5, 1946

"Statement of George White, age 52, address Beverly Wilshire Hotel, Beverly Hills, Calif. Concerning accident that occurred on July 20, 1946, approx. ? on highway 101 near Solana Beach, Calif.

"I was driving Mr. Walter Haggerty Lincoln Sedan. The car is registered in the name of [313] Northumberland Mining Co. Mr. Haggerty is an officer of the Company. The Lincoln Sedan is registered in State of Nevada. I had full permission to drive the car from Los Angeles to San Diego as my car was in the repair shop.

"I left Los Angeles approx. 6:30 P. M. on July 20, 1946 and drove at average rate of speed. At San Clemente, Calif. at a Cafe and had 2 cups of coffee."

Then in parentheses "(drive in)" under the word "Cafe."

It is signed on that page, "George White."

"I was alone in the car. I had driven on considerable distance, when I must have dozed off to sleep for a moment. The next thing I remember my car was at almost a standstill on the highway, I looked around a moment without getting out of the car, then put car in low gear and proceeded on to San Diego. I had entered the City of San Diego when Officers stopped me and took me to Police Station without telling me what I was being taken in for except that there had been an accident and they were stopping all cars.

"Later I was booked for hit & run suspicion of manslaughter.

(Testimony of George White)

“Atty. Thomas P. Menzies, 548 South Spring St. and L. E. Clifton (Claim Adjuster) and representing [314] the Home Indemnity Co. of New York, insurance carriers for the Northumberland Mining Co. My insurance with Standard Accident is on a 1942 Packard Coupe.”

Then there is a word I can't make out and it is signed, “George White.”

It looks like—

The Witness: Maybe I can make it out.

(The document was handed to the witness.)

Q. By Mr. Nourse: Is that in your handwriting?

A. No.

Q. I refer to the last word right by your thumb.

“A. That is “Shaughnessy,” isn't it? That is right. “Shaughnessy,” the man's name from the Automobile Club in San Diego.

Q. In San Diego,—Shaughnessy?

A. Yes. I remember now.

Mr. Nourse: I offer this as Exhibit next in order.

The Clerk: Admitted, your Honor?

The Court: Yes.

The Clerk: Plaintiff's Exhibit 23 in evidence.

(The document referred to was marked Plaintiff's Exhibit 23, and was received in evidence.)

The Court: Mr. Cross, what is the date of that letter?

The Clerk: This letter, your Honor, is dated August 5, [315] 1946.

Q. By Mr. Nourse: Mr. White, I want you to tell the court in your own words what transpired on the day

(Testimony of George White)

of July 20, 1946, from the time you first obtained possession of the Lincoln car on that day up until the time you were stopped by an officer on entering San Diego.

A. I went to the garage of my hotel, which is in the basement, and took the car out. At the top of the grade—you go up an incline to get out—a Miss Audrey Young, whom I was to take to the races, was there with her father waiting for me. I drove her to the race track. We got to the race track, and we hurried in, as everybody does attending the races. Whenever I go there, I usually run up and down between races the paddock to the Turf Club, which is quite a few flights.

Mr. Menzies: Will you keep your voice up, Mr. White? It is hard to hear you over here.

The Witness: Yes, sir. We stayed until the last race. As soon as that was over, we all make a rush to leave. On leaving the race track, I approached the car, the Lincoln car, and noticed the left front headlight was smashed, broken.

Q. By Mr. Nourse: Tell what you mean. Describe that damage.

A. It was just broken. The glass was broken. In our haste, the same as everyone else, in order to beat the traffic [316] and to get out of the track, and nobody being there to complaint to, I said, "What is the use?" So we climbed in the car, and I said, "Well, somebody must have moved this car. It isn't where I left it, I am quite sure." I was talking to myself.

Q. Just tell what you did, not what was in your mind.

A. So we got out of the track as fast as we could, trying to beat as much traffic as we could, and I drove Miss Young back. And on the way back she happened to



(Testimony of George White)

tell me that she forgot to tell her father to pick her up at the hotel, but that she would like to go to the hotel as she had an appointment that was going to be near there, and she would take a taxicab. So I drove her to the drug store corner of the Beverly Wilshire Hotel, where she got out.

I drove around the corner to the side entrance of the hotel. I went in, went up to my apartment, got my little overnight bag, stopped for a moment to talk to Mr. Haggerty, to tell him I was driving down to San Diego. He said, "Very nice. Have a nice time," and off I went.

I forgot to tell in the previous statement that I stopped at a delicatessen.

Q. Just tell what you did. Don't remember what you said before. Tell the court what you did, irrespective of what you may have told anybody.

A. On leaving the hotel I stopped at a delicatessen which [317] is about two or three blocks from there, the name of which is Nate & Lou's on Beverly Boulevard, or Beverly Drive, rather, and I got two or three sandwiches, as I usually do. I drove on, and I usually drive until I get too—

Q. Not what you usually did. Please tell what you did that night, Mr. White.

A. I drove until I got to Sepulveda Boulevard, where there is not much traffic. It is about a six-lane highway. Then I just drive along and eat my sandwiches, which is my dinner.

When I got to San Clemente, I stopped at this drive-in and had two cups of coffee. I drove on. The next thing I knew my car was almost slowed down. Suddenly I realized I had been unconscious, or asleep, or something.

(Testimony of George White)

I grabbed myself together, had to put the car in low gear to get it going again, and continue on my way.

I stopped at the Del Mar Hotel. A Mr. Lou Irwin, who was an agent, told me he was interested in the hotel with some people who had newly acquired the hotel, and I thought I would stop in and inquire for a reservation for when the Del Mar races opened. I looked around for a few minutes in the lobby and in the bar, and could not find Mr. Irwin, so I got back in the car and drove on to San Diego.

As I neared San Diego I noticed a motorcycle. I constantly look through the mirror out of force of habit, and I [318] saw a red light, the motorcycle, which seemed to come out of nowhere and seemed to come just at the car, and I thought, "Well, I wonder what is up."

Q. Tell us what happened.

A. The motorcycle approached, and as he approached I pulled over to the right, and I saw that he was looking for me, and we stopped. I said, "What is"—

Q. Will you stop for just a minute there? I want to go back a little. When you say you came to consciousness and realized you had been asleep or unconscious, did you then know where you were on the highway?

A. No, I didn't quite recognize any landmark. It was too dark.

Q. What was the first landmark that you recognized after that?

A. Just before coming to Del Mar, there is sort of a bridge, a white bridge, a landmark with which I am kind of familiar, and I knew I was nearing Del Mar.

(Testimony of George White)

Q. Is that bridge, the entrance to the bridge, also the turn to the left and the northern entrance to the Del Mar track?

A. If you were going to the track, you would turn left a short time before you got to the bridge.

Q. Now, did you notice any difference in the amount of light thrown by your lights on the road before and after you [319] had this period of unconsciousness?

A. No, I didn't.

Q. When you recovered consciousness, what did you do? Just tell the court.

A. Just put the car into low gear. I said, "By golly, I must have dropped off, or something." That's about all. There wasn't anybody to talk to about it, and on I went.

Q. All right. Now, the officer stopped you, and you drew off to the side of the road. Did you alight from your car there?

A. No, sir.

Q. How?

A. No, sir.

Q. Tell what occurred.

A. As I remember it, as the officer approached I asked him, or I said, "What is the matter? I am not speeding."

He said, "No, sir. It isn't that. There was an accident a few miles back, and we are stopping all cars, and your car looks suspicious," or words to that effect.

Q. Then what did he do?

A. He asked me would I mind accompanying him to the police station, and I said, "Not at all."

Q. Well, did he go—

A. Oh, he walked around. He looked around. He took out his flashlight, looked at the car around the front, the [320] front of the car, then came back, and that is

(Testimony of George White)

when he asked me would I mind accompanying him to the police station.

Q. Did he mention anything about damage to the car there?

A. Yes, he mentioned the headlight, the left front headlight, and I thought he was referring to the broken glass I had seen. And I said, "That happened at Santa Anita," but I mean to say "Inglewood."

Q. And he asked you to accompany him, then?

A. Then he said, "Would you mind accompanying me to the police station?"

Q. And you did?                      A. And I said, "Not at all."

Q. Now, when you arrived at the police station, which side of your car did you get out of? Or, when you got to Del Mar, when you went to Del Mar, which side of your car did you get out of?

A. I always get out of the right side.

Q. Which side did you get out of then?

A. The right side.

Q. When you came back, did you see the front of your car at all?                      A. I didn't notice it.

Q. You drove into San Diego and went to the police station, and which side of your car did you get out of there? [321]                      A. On the right-hand side.

Q. Now, do you have a customary side of your car to get out of?                      A. Yes, sir.

Q. I mean a habitual side?                      A. Yes, sir.

Q. Which side?                      A. The right-hand side.

Q. Do you have a reason for that?

A. Yes, sir.

(Testimony of George White)

Q. What is it?

A. I might get hit with fourteen cars on the left-hand side. The right-hand side is always to the curb.

Q. All right. Now, you were taken into the police station and questioned there. Where was your car with relation to the door to the police station, that you entered?

A. We pulled up to the police station, and made a turn. I went inside, followed the motorcycle officer, and asked him what it was all about. He said, "Oh, well,"—

Q. Did you hear the question? Where did you park your car at the curb? It is understood that you parked heading north.

A. Correct.

Q. Now, where was it parked at the curb with relation to the door of the police station which you entered? [322]

A. Near the door.

Q. Where was the front of it with relation to that door, north or south?

A. The front of the car?

Q. Yes.

A. Well, the front of the car, north.

Q. I know, but where was the front of it? If you walked right out of the door, would you have passed in front of the car, behind the car, or would you have run into the side of it?

A. The car was a little to the left. That would be south of the door.

Q. How much?

A. I wouldn't—maybe 15 or 20 feet; 10 feet. I really wouldn't want to swear to that.

Q. All right. Now, did you stand there in the doorway at the time the pictures were taken?

A. Yes, sir.

(Testimony of George White)

Q. Did you then see the damage to your car?

A. No, sir. All the time that I was in the doorway, whenever the motorcycle officer that brought me there was there, I talked with him casually. There were photographers and several more men maybe, were always in front of the car. I paid no attention. I ignored the whole proceeding, because I was quite sure that I was not involved in any [323] accidents at the time.

Q. You did not go out to the car again after you left it?  
A. No, sir.

Q. Now, you had talked with Mr. Menzies then on the 22nd, the evening of the 22nd. That would be on Monday evening?  
A. On a Monday night.

Q. Yes.

A. I don't remember it by date, but I spoke with him.

Q. With him and Mr. Clifton?  
A. Yes, sir.

Q. Did you tell them then that you had fallen asleep?

A. No, sir.

Q. Or become unconscious at the wheel?

A. No, sir. I didn't think of it. I didn't think it was important, as at the time I felt quite sure I was not involved in any accident.

Q. And you didn't tell them on the 23rd, when they had your testimony taken down by a reporter?

A. I think it was later that afternoon when they showed me—

Q. No. Did you, when you made the report in the morning, tell them?

A. When the reporter was there? [324]

Q. —that you had fallen asleep?  
A. No, sir.

(Testimony of George White)

Q. And for the same reason that you had given us for not telling it on the 22nd?

A. I was quite sure it was unimportant and that I wasn't involved in any accident. That is the reason I didn't tell them.

Q. Now, you did tell them you had not been involved in any accident? A. That's right.

Q. That you hadn't collided with anything or anybody? A. Yes, sir.

Q. Was that your honest belief at that time?

A. Yes, sir.

Q. Had you at that time seen any pictures of the damage to your car, or the car in its damaged condition?

A. No, sir.

Q. Do you recollect when you first saw those pictures?

A. Yes, sir.

Q. —of the front of the car in its damaged condition?

A. Yes, sir.

Q. About when?

A. I think it was the same day that I gave the statement with the reporter there. I think it was later that afternoon that Mr. Menzies showed me the newspapers that had [325] the pictures of the car in it, and the minute I saw those pictures, I said, "The car was not damaged in that manner, and if that is the car that hit them, it must have happened when I fell asleep."

Q. Did you then tell him that you fell asleep?

A. Yes, sir.

Q. When did you learn that there was human blood—you did learn later that there was human blood and flesh found on your car?

A. Yes. When Mr. Holt told me that.

(Testimony of George White)

Q. He told you about the imprints also of clothing on the car?      A. Yes, sir.

Q. And when you learned that, did you then believe it was your car that had struck the people?

A. Well, I couldn't believe otherwise. And I told Mr. Holt that evidently the car was the car that I was driving and it must have happened when I dozed off.

Q. Now, did you tell Mr. Menzies at any other time than the time you have mentioned that you fell asleep, and that you thought the accident must have happened then, or in substance that?      A. Yes, sir.

Q. Whom?

A. Right in his office, in the presence of Mr. Clifton [326] and Mr. Watt, there, his partner.

Q. Tell what was said.

A. Well, when Mr. Holt called my attention to the fact, I was in San Diego, and Mr. Holt asked me did I tell Mr. Menzies. I said, yes. He said, "Be sure and have him put that in the record that you made under oath, this statement that you made under oath." And as I remember it, Mr. Holt telephoned Mr. Menzies right then. He said, "I will call him now and tell him." And they had quite a conversation about it back and forth over the telephone. Evidently Mr. Menzies did not want to put that statement in. So Mr. Holt said—I was on my way to Los Angeles—to call on Mr. Menzies, and Mr. Holt said, "Be sure and tell Mr. Menzies that you want that inserted in the statement that you made under oath," which I did.



(Testimony of George White)

Q. Now, at some time you took your policies of insurance that you had on your Packard in to Mr. Menzies. When was that, do you remember? Tell the court how you happened to do that.

A. I don't remember too much about it. He asked if I was insured, and I said I had the policy. I don't remember where it was.

Q. Well, were you in Mr. Menzies's office on more than one occasion?

A. I don't remember that. [327]

Q. Do you remember the occasion when you gave him the policies?

A. No, I don't remember the day that I gave them to him.

Q. Was it a different day than the day when you went up there and signed some documents, affidavits, and a reservation of rights?

A. I don't quite remember. I think I might have given it to him before that.

Q. Well, could it be that you told him about falling asleep on the day you gave him the policies rather than on the day you signed those papers?

A. It could be, but I don't remember it.

Q. Well, what did Mr. Menzies say when you asked him to put that into the statement?

A. I don't remember what he said, but I do remember that he didn't want to do it. He didn't seem to want to put it in, anyhow.

Q. Now, did you tell him on that day that you were going to plead guilty?

A. I told him that Mr. Holt advised me to plead guilty, and that I was going to do it, and what did he think about

(Testimony of George White)

it. And he was noncommittal. He kind of grinned, I remember, and said, "Well, I don't know." That was about it.

Q. Now, you did enter a plea of guilty? [328]

A. I did.

Q. Will you tell the court why?

A. When I asked Mr. Holt why he wanted me to plead guilty, he said, "Well,"—

Mr. Menzies: I move that be stricken as hearsay, any conversation between this witness and Mr. Holt.

The Court: Yes, I will have to sustain that objection. It is in the record by Mr. Holt, anyway.

Q. By Mr. Nourse: Well, did you do it on the advice of Mr. Holt?      A. Yes.

Q. Did you object to following that advice?

A. I did.

Q. What did you say in that regard?

Mr. Menzies: Object to that on the ground it is hearsay.

Mr. Nourse: Your Honor, this isn't hearsay. This is to prove the state of mind of the witness. I have contended here and will contend that this was an inconsistent act, in that it admitted that he had hit and run. Now, if there is an explanation of that, it takes away the admission, just as much as it would in the trial of personal injury actions.

The Court: I think that is correct, to show why it was done. I think that is correct, counsel, in this case. Now, he pleaded guilty to what?

Q. By Mr. Nourse: You pleaded guilty to the hit and [329] run charge—      A. Yes, sir.

(Testimony of George White)

Q. —that was filed in the State Court?

A. Yes, sir.

Mr. Nourse: Now, what was the question that I asked him.

(The record was read by the reporter as follows:

“Q. Did you object to following that advice?

“A. I did.

“Q. What did you say in that regard?”)

The Witness: Is that the last question? I thought you asked did I object to pleading guilty.

Q. By Mr. Nourse: What is the answer?

A. Yes, I objected because I didn't like the idea of pleading guilty to an offense that I knew nothing about. And Mr. Holt said, “Technically, according to law, you are innocent. While I believe you, I am quite sure that a jury won't. It is very hard to believe. If you put the State to the expense of a jury trial, the court might be more severe. If you plead guilty to the hit-run charge, I am quite sure you will be put on probation, your record being so clean,” and so forth. And that convinced me, so I agreed to plead guilty to the hit-run charge.

Q. Now, after you had pleaded guilty, you received the answers which were prepared by Mr. Holt?

The Court: Prepared by Mr. Holt? [330]

Mr. Nourse: No, the answers which were prepared by Mr. Menzies.

Q. By Mr. Nourse: You received from Mr. Menzies, did you not, the answers to the complaint in the State Court actions?

A. I very seldom read any of the—

(Testimony of George White)

The Court: No. Listen to the question, Mr. White. Read the question, please.

(The question was read.)

Q. By Mr. Nourse: May I make this a little more clear? Do you remember Mr. Menzies bringing you in San Diego a letter addressed to you in Beverly Hills, and an answer to each of the complaints against you for damages, in which you would have denied that the accident occurred?

A. The papers he brought me I brought to Mr. Holt. I am not familiar with—

The Court: No. Answer the question.

The Witness: I brought them to Mr. Holt—

The Court: That is all right.

The Witness: —and Mr. Holt said, “You cannot sign these.”

Q. By Mr. Nourse: Why?

A. He said, “You cannot sign these because these letters state that you did not —that the car did not hit the people.” [331]

Q. And did you refuse to sign them for that reason?

A. Yes, sir.

Q. Mr. White, I will show you Defendants’ Exhibit N. Is that your signature?

A. That is my signature, yes.

Q. Do you remember signing that document in Mr. Menzies office?

A. I didn’t read the document—

The Court: No. Listen to the question, Mr. White.

The Witness: In Mr. Menzies’ office on this day he handed me several papers to sign. I was under the impres-

(Testimony of George White)

sion he was acting in my interests, and I was in a hurry to get to Inglewood, and as he handed me each paper to sign, I think Mr. Clifton and Mr. Watt were there, I asked him, "Is it O. K. to sign this?" I didn't want to bother reading it. He said, "Yes, O. K." And I signed whatever papers he handed me there.

Q. By Mr. Nourse: Did he explain that this was some agreement between you and the Home?

A. Not as I remember. I didn't ask. I asked 'was it all right to sign them.

Q. When they came to see you in San Diego, what did they say as to whom they were representing, or what their capacity was when they called on you?

A. You mean when I first saw them in San Diego? [332]

Q. Yes.

A. That I remember distinctly, Mr. Menzies, saying, "We are here to help you." He said, "You couldn't hire me for a million dollars, but we are here to help you all we can," and so forth, "and we are very, very cordial." And we talked and talked about the accident.

Q. No. What did he say as to his capacity? Did he say anything as to how he was going to help you, in what capacity he was going to act?

A. He led me to believe that he was going to be my attorney.

The Court: No, strike that out.

Q. By Mr. Nourse: Please, Mr. White, what did he say?

A. That they were going to help me all they could, and look after the case, look after my interests in the case.

(Testimony of George White)

Q. On which side of the case, did they say?

A. That I don't remember, but I remember Mr. Menzies did say that I ought to get a good lawyer to handle the criminal action.

Q. Now, when you were there on the 26th, you were shown the transcript of the conversation that had occurred on the 23rd at San Diego?

A. You mean the one the reporter took down,—my statement?

Q. Yes. [333]

A. In Mr. Menzies' office. He handed me a copy, and I didn't read it. He asked me to sign it, and I told him that I would rather have Mr. Holt read it first. He handed me a copy, and then he said, "Well, I will be going to San Diego." He said, "I will take it down, take one with me, and give it to him." So I threw it back across the desk to him. That is the day I was there when I was going to the race track to find out if the parking man knew if my car had been moved.

So I didn't sign it and that was the—yes, it was at that time again I had told him about having fallen asleep and that I wanted to insert that in there, in that transcript, and he didn't seem to want to do that.

Q. Nothing was said to you about your having breached the policy in any way? A. No, sir.

Q. No further questions were asked you as to how the accident occurred? A. No, sir.

(Testimony of George White)

Q. Or as to the damage to the car, or anything of that kind?      A. Not a word.

Mr. Nourse: You may cross-examine.

Mr. Luce: No questions.

Mr. Lonergan: No questions. [334]

The Court: Mr. Menzies.

### Cross Examination

By Mr. Menzies:

Q. Mr. White, isn't it a fact that it was suggested to you when you intimidated you would plead guilty, that it might materially affect the provisions of your policy?

The Court: Just a moment. Will you read that, please?

(The question was read.)

The Witness: Not that I recall.

Q. By Mr. Menzies: You haven't any recollection of that at all, have you?      A. No.

Q. Now, in regard to that non-waived agreement—can you hear me now Mr. White?

A. Yes.

Q. —didn't you ask Mr. Watt the effect of that?

A. I may have.

Q. And didn't he tell you?

A. I don't remember whether he did or not. In fact, I didn't pay much attention to anything about the legal papers.

Q. In other words, you were in a hurry to make an appointment; isn't that correct?

A. In other words, I had great confidence in you people and signed the things that were handed me. [335]

(Testimony of George White)

Q. Just answer the question. In other words, you were in a hurry to make an appointment; isn't that true?

A. At the race track. I told you I was in a hurry to get to the race track, yes.

Q. Do you remember talking to Mr. Nourse in San Diego, Mr. Paul Nourse, who is here in the court room and has just been examining you.

Mr. Nourse: Give him the date. It wasn't in San Diego. It was at the Road Camp.

Q. By Mr. Menzies: It was at the Road Camp?

A. Yes.

Mr. Nourse: September 9th.

Q. By Mr. Menzies: On September 9th?

A. Yes.

Q. Did you tell Mr. Nourse at that time, in substance or effect, "I am not sure when I first told Mr. Menzies I had dozed off, but it was before any answers to the State Court suits were prepared. Also, I told him before they were prepared that I believed it was my car that hit the people." Do you recall telling Mr. Nourse that?

A. Yes.

Q. Was that correct? A. It could be.

Mr. Menzies: That is all.

Mr. Nourse: That is all. [336]

Mr. Luce: That is all.

Mr. Lonergan: No questions.

The Court: That is all, Mr. White.

Mr. Luce: Your Honor, is Mr. White now excused so that the officer may return him to San Diego?

Mr. Menzies: Certainly.

The Court: Mr. Lonergan?



Mr. Lonergan: Yes.

The Court: Are you through with Mr. White, Mr. Nourse?

Mr. Nourse: I don't know if they are going to have any evidence. I can't tell.

Mr. Menzies: May I have one moment?

The Court: Yes.

Mr. Menzies: Mr. Watt.

HAROLD L. WATT,

called as a witness by and on behalf of the defendant, Home Indemnity Company of New York, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Your full name, please?

The Witness: Harold L. Watt.

Q. By Mr. Menzies: Mr. Watt, what is your profession?

A. I am an attorney-at-law.

Q. How long have you been admitted to practice before the courts of the State of California and the United States [337] District Court here?

A. Twenty-eight years.

Q. Now, do you recall an occasion when Mr. White was in our office?

A. Yes, I believe I do. I am sure I do.

Q. Do you recall that that was on or about the 26th of August, 1946?

A. Yes, I can fix the time by reference to the time that we had under consideration the preparation of pleadings in the civil cases.

The Court: That was what date?

(Testimony of Harold L. Watt)

Mr. Nourse: July he means to say.

Mr. Menzies: I should say July, your Honor.

The Court: That is what I thought.

Mr. Menzies: Thank you.

Q. By Mr. Menzies: At that time was Mr. White handed a reservation of rights, which has been offered in evidence here?

A. I was present in your room when Mr. Clifton and Mr. White, I believe, during the entire time that Mr. White was in the office, although he arrived before I came in the office. The document which has been identified as a reservation of rights was handed to Mr. White in my presence in your room.

The Court: That is Exhibit N?

Mr. Menzies: That is Exhibit N, sir. [338]

The Court: Proceed.

Q. By Mr. Menzies: What was said in regard to that Exhibit N, the reservation of rights?

A. I recall your asking him to sign it and stating to Mr. White that it was a reservation of rights. I recall Mr. White asking if it was all right to sign it, asking you if it was all right for him to sign it, and I recall that he turned to me and said, "What is this about?" Or, "What is this?"

I think that was the only direct conversation perhaps that I had with Mr. White in the interview, and I recall distinctly that I told him—I explained to him as well as I could the nature of that reservation of rights was; that, in my opinion, it did not prejudice any of his rights under the policy or any of the rights of the company under the policy, but that the company would conduct its examination and would defend him without reservation

(Testimony of Harold L. Watt)

of any rights which it might have, according to the terms of the policy. I am sure that explanation was made in substantially those words in Mr. White's presence, directly to Mr. White.

Q. At that same time was there any mention made as to whether or not Mr. White might plead guilty to 480 of the Vehicle Code?

A. Yes, the subject of the criminal charges came out, and Mr. White said that he had under consideration entering a plea of guilty. As I recall it, he did say in so many [339] words that Mr. Holt had advised him to plead guilty for reasons which he did not—Mr. White said for reasons which he, Mr. White, did not feel free to discuss with us, his reasons why he thought it was in his interests to plead guilty.

The Court: This part of the testimony is not rebuttal, this last part.

Mr. Menzies: Very well, your Honor.

The Court: All right. Proceed.

Q. By Mr. Menzies: Was there any mention in that conversation, while Mr. White was there, about his having fallen asleep?

A. There was no mention whatever of that subject or of the accident directly, that is, the happening of the accident.

Q. And was there—

The Court: When did you first learn that Mr. White contended that he had fallen asleep?

The Witness: Through Mr. Holt's report, when Mr. Menzies had taken answers to San Diego for execution or for verification by Mr. White, and had left them there for submission to Mr. Holt, so it was reported to me, and

(Testimony of Harold L. Watt)

then Mr. Holt phoned our office, and I was present when Mr. Menzies talked with him over the telephone, and that was the first intimation I had that Mr. White claimed he had fallen asleep. That was through Mr. Holt, after he had decided to plead guilty to the [340] criminal charge, and when he was asked to verify answers in accordance with his original sworn complaint.

Mr. Menzies: You may cross-examine.

#### Cross Examination

By Mr. Nourse:

Q. I want to clear up one thing. I think you have two things confused. In your very last answer you said you learned that when Mr. Holt said that he had advised Mr. Menzies that he was going to plead Mr. White. Isn't it the testimony of Mr. Menzies and the testimony of Mr. Holt that occurred in San Diego, and isn't that the time that the first conversation occurred with Holt, in which the fact that White had fallen asleep and believed he might have hit the people came out?

A. Well, you understand, Mr. Nourse, that I was never in San Diego on this case, and that I never personally had any conversation with Mr. Holt. The court asked me when I first learned that Mr. White claimed that he had fallen asleep, and my answer would be that it was in connection with the submission of the answers in the civil cases to Mr. White.

Q. Before they were submitted?

A. No, after they were submitted.

(Testimony of Harold L. Watt)

Q. In other words, you didn't learn of that phase of it from Mr. Menzies until after there had been a refusal to [341] verify the answers?

A. That is correct.

Q. But you don't mean to intimate that that information did not come to Mr. Menzies or to your office before that time?

Mr. Menzies: We don't contend that, Mr. Nourse.

Mr. Nourse: All right. That is all.

The Court: That is all.

(Witness excused.)

Mr. Menzies: Take the stand, Mr. Hake, please.

LUTHER M. HAKE,

recalled as a witness on behalf of the defendant, Home Indemnity Company of New York, having been previously sworn, testified further as follows:

The Court: Let the record show that this witness has been previously sworn. Proceed.

Direct Examination

By Mr. Menzies:

Q. Can you tell the court the lighting conditions at the intersection of Highway 101, about 100 or 150 yards south of where this accident occurred?

A. Yes, sir.

Mr. Nourse: Just a moment. I don't think that is rebuttal, your Honor, and there were other witnesses here who could have testified to that point much better. [342]

Mr. Menzies: My point is simply this, your Honor, that Mr. White testified that when he came to that it was

(Testimony of Luther M. Hake)

in a dark part of the road and that he didn't know where he was, didn't realize where he was until he was almost down to Del Mar.

The Court: You may answer the question.

The Witness: On the southeast—on the southeast corner of the intersection of Highway 101 and Rancho Santa Fe Road, there is an overhead light.

Q. By Mr. Menzies: Is that the usual street arc light that is overhead? A. Yes, sir.

Q. Any other lights besides that?

A. Then further south, on the south end of the southwest corner of the plaza, in the center of Solano Beach, there is another light of a similar type.

Q. Is there any light there by the bank, which would be the northwest corner?

A. There is a street light there of a type that comes up from the ground.

Q. That is on a short concrete pole?

A. Yes, sir.

Q. Ten or Twelve feet high?

A. Yes, sir.

Q. Were there any other lights between the Solano [343] Beach Cafe and the one at the corner there at the plaza by the bank, on the northwest corner, if you recall?

A. There is one or two standards placed there, but as to whether or not they were burning, I can't answer that.

Q. You do know that the other lights that you have mentioned were burning? A. Yes, sir.

Mr. Menzies: That is all.

(Testimony of Luther M. Hake)

Cross Examination

By Mr. Nourse:

Q. Mr. Hake, just for my information, are these buildings there on the shore side or the ocean side, or the inland side of the highway? I forget.

A. They are on the west side, or the ocean side.

Q. On the ocean side. So they face the hills or mountains? A. Yes, sir, they face east.

Q. And on the opposite side there are no buildings at all, are there? A. No, sir.

Q. You heard the testimony of Mr. Warren that the lights had been put out at his station at that time?

A. Yes, sir.

Q. And all of the stations there had closed down at the time that this accident happened? [344]

A. Well, there is only one station there in that locality, that immediate locality, I should say.

Q. And that would be his station?

A. Yes, sir.

Mr. Nourse: That is all.

Mr. Menzies: That is all.

The Court: The testimony of the cafe owner was—

Mr. Menzies: I am sorry, your Honor. I didn't hear you.

The Court: The testimony of the cafe owner was—

Mr. Menzies: That the light was out immediately in front of the cafe.

The Court: That is right. I want to know if the witness noticed that, that the light was out and that the lamp post immediately in front of the cafe was not lighted.

The Witness: No, sir, I didn't notice whether that was burning or not.

The Court: What was the condition of the weather?

The Witness: It was clear. The pavement was dry.

The Court: On that night?

The Witness: Yes, sir.

Q. By Mr. Nourse: It was one of those dark, clear nights; not with any moon?

A. There was no moon.

Mr. Nourse: That is all.

The Court: That is all. [345]

Mr. Menzies: May this witness be excused?

The Court: Yes.

(Witness excused.)

The Court: Anything further?

Mr. Menzies: That is all. We rest

Mr. Nourse: We rest.

[Endorsed]: Filed Jun. 13, 1947. [346]

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[Endorsed]: No. 11661. United States Circuit Court of Appeals for the Ninth Circuit. Home Indemnity Company of New York, Appellant, vs. Standard Accident Insurance Company of Detroit; George White; James Carl Fitzgerald; James Richard Osborne; Michael Lee and Patricia Lee, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed Jun. 20, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.



In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11661

(Civil Action No. 5729 O'C, District Court, Southern  
District of California, Central Division)

STANDARD ACCIDENT INSURANCE COMPANY  
OF DETROIT,

Appellee,

vs.

HOME INDEMNITY COMPANY OF NEW YORK,  
et al.,

Appellants.

APPELLANT HOME INDEMNITY COMPANY  
OF NEW YORK'S STATEMENT OF POINTS  
ON APPEAL, AND DESIGNATION OF  
RECORD

Appellant Home Indemnity Company of New York makes the following statement of points upon which it intends to rely upon this appeal:

1. The court's finding of fact that George White has at all times cooperated with the defendant Home Indemnity Company of New York in the investigation of the accident referred to in said complaint is without support in the evidence and is contrary to the evidence.

2. The court's finding of fact that the defendant George White has not breached any of the conditions of the policy issued by the defendant, Home Indemnity Company of New York, upon his part to be performed, is without support in the evidence and is contrary to the evidence.

3. The court's finding of fact that the defendant George White did not, in reporting the accident referred to in said complaint to the Home Indemnity Company of New York, make any false, conflicting, misleading or inconsistent statements of fact, is without any support in the evidence and is contrary to the evidence.

4. The court's finding of fact that the defendant Home Indemnity Company of New York has not been in anywise prejudiced in any action, statement or omission of George White is without support in the evidence and is contrary to the evidence.

5. The court's finding of fact that it is the duty of the Home Indemnity Company of New York to attempt to establish the truth of the statement of George White, that he was asleep and did not know that the accident occurred, so long as George White maintains that that statement is true, is without support in the evidence and is contrary to the evidence.

6. The court's finding of fact that the Home Indemnity Company of New York is estopped in this action to assert the untruth of said statement or to assert that by reason of said statement he has failed to cooperate with it in the investigation and defense of the claims made by the plaintiff in said court actions, is without support in the evidence and is contrary to the evidence.

7. The court's finding of fact that defendant George White has performed the duty of cooperating with defendant Home Indemnity Company of New York, and that there has been no breach by him of the conditions of plaintiff's policy requiring him to cooperate with it, is without support in the evidence and is contrary to the evidence.

8. The evidence shows that defendant George White breached the cooperation clause of the Home Indemnity Company of New York's policy of insurance, in making a false statement of the facts and circumstances of the accident and his connection with it.

9. The evidence shows that compliance with the cooperation clause of the Home Indemnity Company of New York's insurance policy is a condition precedent to the attaching of liability thereunder, and the maintenance of any court action on said policy.

10. The evidence shows that defendant George White made such conflicting and irreconcilable statements regarding the happening of the accident and his connection therewith as to totally destroy his credibility as a witness for the defense of the actions to the prejudice of the Home Indemnity Company of New York.

\* \* \* \* \*

Dated: July 2, 1947.

THOMAS P. MENZIES  
HAROLD L. WATT

By Thomas P. Menzies

Attorneys for Appellant Home Indemnity Company of  
New York

[Affidavit of Service by Mail]

[Endorsed]: Filed Jul. 7, 1947. Paul P. O'Brien,  
Clerk.



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## APPELLANT'S BRIEF.

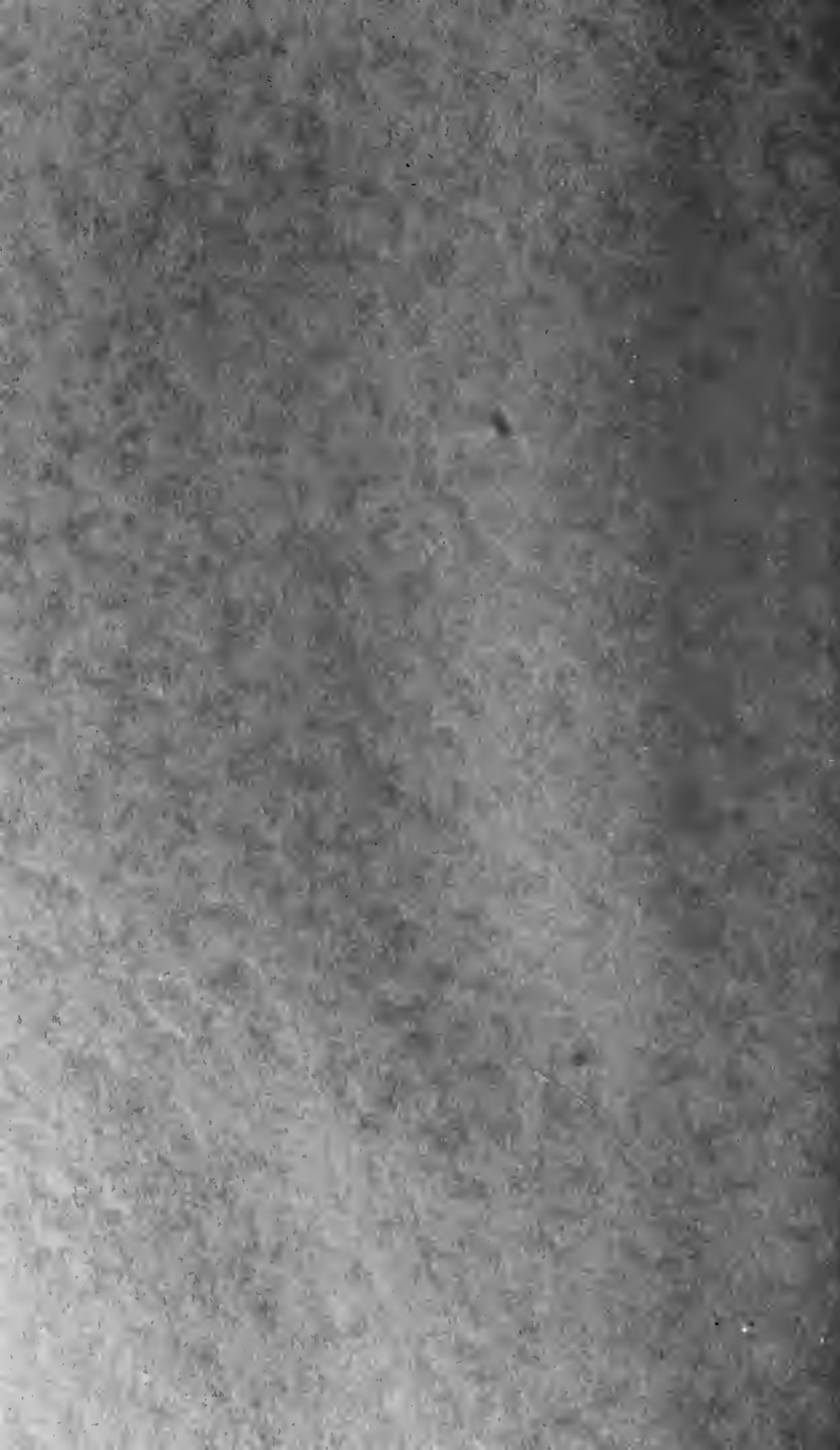
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PAUL R. BERTON



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**APPELLANT'S BRIEF.**

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**Jurisdiction.**

In compliance with Rule 20 (C. C. A. 9, Subsection 2b) appellant states that the statutory provisions believed to sustain the jurisdiction of the District Court to render judgment and of this Court upon appeal to review the judgment are as follows:

*United States Code Annotated, Title 28, Section 400 (Judicial Code 274d):* DECLARATORY JUDGMENTS AUTHORIZED:

*Procedure:* (1) "In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any in-

terested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

*United States Code Annotated, Title 28, Section 41 (Judicial Code, Sec. 24, Amended): ORIGINAL JURISDICTION.*

The district courts shall have original jurisdiction as follows:

1. UNITED STATES AS PLAINTIFF: CIVIL SUITS AT COMMON LAW OR IN EQUITY. *First.* "\* \* \* or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States \* \* \*."

*United States Code Annotated, Title 28, Section 225 (Judicial Code, Sec. 128): APPELLATE JURISDICTION.*

(a) *Review of final decisions.* "The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—*First:* In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

It appears from the plaintiff's complaint [R. pp. 2 and 3] that there is a diversity of citizenship between plaintiff and all of the defendants and that the amount in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs of suit, and the District Court so found in its Findings of Fact [R. p. 174].

### Statement of the Case.

The defendant Home Indemnity Company of New York, a corporation, hereinafter referred to as the "Home", on November 30, 1945, issued its combination automobile policy insuring Walter Haggerty and Northumberland Mining Company, jointly and severally, as their respective interests may appear, against bodily injury liability in the amount of \$100,000.00 for each person, \$300,000.00 each accident, and property damage liability in the amount of \$5,000.00 each accident resulting from the operation of his 1942 Lincoln Zephyr four-door sedan, subject to the limits of liability, exclusions, conditions and other terms of the policy.

Paragraph III of the policy defining the word "Insured" provided in part as follows [R. p. 26, *et seq.*]:

"The unqualified word 'insured' wherever used in coverages A and B and in other parts of this policy, when applicable to such coverages, includes the named insured and, except where specifically stated to the contrary, also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured."

Paragraph XVII of the conditions upon which as a condition precedent the insurance attached, provided [R. p. 28]:

#### ASSISTANCE AND COOPERATION OF THE INSURED.

"The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of wit-

nesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident."

Paragraph I of the conditions provided, with reference to notice of accident [R. p. 27]:

"When an accident occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses."

Paragraph VI of the conditions specifically provided [R. p. 27]:

#### ACTION AGAINST COMPANY

"No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company. \* \* \*

Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder."

Plaintiff and respondent Standard Accident Insurance Company, hereinafter referred to as "Standard", by its automobile liability policy, effective from September 29, 1945, to September 29, 1946, insured George White against bodily injury liability in the amount of \$25,000.00, \$50,000.00 each accident, from the operation of a 1942 Packard automobile.

Paragraph VIII of said policy providing [R. p. 18] :

TEMPORARY USE OF SUBSTITUTE AUTOMOBILE

"While an automobile owned in full or in part by the named assured is withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction, such insurance as is afforded by this policy with respect to such automobile applies with respect to another automobile not so owned while temporarily used as the substitute for such automobile. This insuring agreement does not cover as an insured the owner of the substitute automobile or any employee of such owner."

Paragraph XIII of the Standard's policy provided [R. p. 19] :

OTHER INSURANCE—COVERAGE A.

"If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance under Insuring Agreements VII and VIII shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy ap-

plicable with respect to the automobile or otherwise, against a loss covered under either or both of said insuring agreements.”

On July 20, 1946, George White, while driving the Lincoln Zephyr automobile described in the policy of the defendant Home, with the consent of the Northumberland Mining Co., at about 10:00 o'clock P. M., while proceeding from Los Angeles to San Diego, struck two pedestrians, killing one instantly and inflicting injuries on the other from which she subsequently died within a few hours. George White fled from the scene of the accident without stopping to render any assistance to the victims, making his identity known, or making any effort to secure the names of the witnesses to the accident, and when later apprehended by police officers disclaimed any knowledge of having been involved in any accident, and stated that the Lincoln Zephyr automobile had been damaged at the Santa Anita Race Track that afternoon [R. p. 272].

Upon receipt by the Home of notice of the happening of the accident, L. E. Clifton, Claims Adjuster of the Home Indemnity Company, and Thomas P. Menzies, its attorney, proceeded to San Diego and interviewed George White, who stated that he had not been involved in an accident; that he knew nothing of the occurrence of an accident at or near Solano Beach, and that the Lincoln Zephyr automobile had not struck anyone, and that with reference to the damage to the car that he had not been involved in any accident, and that the car had sustained damage to its left front headlight at the Hollywood Park Race Track at Inglewood, California, on the day of the accident [R. p. 382]; that the car was parked in a different place at the race track from where it had been left by

him, and that he saw the damage to the left front fender and headlight, and that at the time he saw it at the Hollywood Park Race Track in Inglewood, California, the headlight was bashed in.

On July 23rd, 1946, at San Diego, George White made a sworn statement, which was transcribed by R. B. Whitcomb, Notary Public and Shorthand Reporter [R. p. 58], in which he again categorically denied that he had been involved in any traffic accident between the time that he left the Beverly Wilshire about 6:30 or 6:45 P. M. until he stopped at the Drive-in stand between 8:30 and 9:00 P. M. in San Clemente [R. p. 65], and specifically denied that he had been involved in any accident or that he had hit any pedestrian or collided with any automobile or any object [R. p. 67].

Two actions were subsequently commenced in the Superior Court of San Diego County to recover damages for the alleged wrongful death of the two pedestrians killed in the accident [R. pp. 144 and 151].

The Home through its attorney, Thomas P. Menzies, took a non-waiver agreement from the defendant George White [R. p. 94] and entered its appearance in said actions, seeking a change of venue to Los Angeles County in respect to one of said actions. Upon this being denied Thomas P. Menzies prepared answers based upon the sworn statement of George White of July 23rd, 1946, which answers said White refused to verify on the ground that they denied the occurrence of the accident and stated that he believed he must have fallen asleep and that the accident could have occurred while he was asleep.

Subsequently, answers were prepared by Attorney John Holt, who represented White in the criminal proceedings

instituted against him as a result of the accident, in substance the same as the answers prepared by Mr. Menzies, except that they admitted the occurrence of the accident, and that the pedestrians were struck. These answers were filed by Mr. Menzies who immediately thereafter withdrew as attorney for Mr. White, and Home disclaimed further obligation under its policy either to defend the two Superior Court actions or to indemnify White on the ground that he had failed to bring himself within the coverage of the policy [R. p. 169].

Respondent Standard thereupon brought an action for declaratory relief wherein it sought to have the respective rights and liabilities under the two policies of insurance declared by the court.

The Home by its answer pleaded a copy of its policy of insurance [R. p. 25] and alleged for a separate and special defense, that in violation of the conditions in said policy defendant George White had failed, neglected and refused to cooperate with the Home in the matter of the investigation of the facts of the said accident and in the handling of the claims arising therefrom by intentionally giving to the Home false, misleading and conflicting statements as to the facts of said case and his connection therewith and by voluntarily entering a plea of guilty to a criminal charge of violation of the provisions of Section 480 of the Vehicle Code of the State of California in respect to the accident referred to [R. p. 22].

On the issues thus joined the Honorable District Court at the conclusion of the trial found that the defendant



George White has at all times cooperated with the defendant Home Indemnity Company of New York in the investigation of the accident herein described and in the defense of the hereinbefore described actions in the Superior Court of the State of California, in and for the County of San Diego, and that defendant George White has not breached any of the conditions of the policy issued by the defendant, Home Indemnity Company of New York, or the plaintiff, Standard Accident Insurance Company of Detroit, upon his part to be performed [R. p. 183, Finding 16].

The Court further found that defendant, George White, did not, in reporting the accident hereinbefore described to the Home Indemnity Company, make any false, conflicting, misleading or inconsistent statements of fact [R. p. 183, Finding 17].

The Court further found that the defendant Home Indemnity Company of New York was not mislead by any statement made to it by the defendant George White, or by any fact reported to it by said George White, and has not been in anywise prejudiced by any action or statement or omission of George White [R. p. 183, Finding 18].

In addition to finding that there has been no breach by White of the conditions of plaintiff's policy in requiring him to cooperate with it [R. p. 185], the Court went further and held that "having assumed said defense it was and is the duty of Home Indemnity Company of New York to attempt to establish the truth of the statement of George White, that he was asleep and did not know that

the accident occurred, so long as said George White maintains that said statement is true, and that said Home Indemnity Company is estopped in this action to assert the untruth of said statement or to assert that by reason of said statement he has failed to cooperate with it in the investigation and defense of the claims made by the plaintiffs in said state court actions." [R. p. 184, Finding 19.]

In accordance with the Findings and Conclusions of Law based thereon, declaratory judgment was accordingly entered, adjudging that defendant George White is the person insured under said policy of insurance and that defendant George White has not breached any of the terms of said policy upon his part to be performed, but has performed all of the terms and conditions of said policy; and that the insurance afforded by said policy is and at all times since the 20th day of July, 1946, has been valid and collectible; and adjudging further that it is the duty of the Home Indemnity Company to pay any judgment that may be rendered against George White in the actions growing out of said action and to pay the reasonable expenses incurred by the defendant George White in the defense thereof [R. p. 188].

### Specifications of Error.

Appellant respectfully submits that the Honorable District Court erred:

1. In finding that the defendant George White did not in reporting the accident make any false, misleading or inconsistent statement of facts [R. p. 183].

2. In finding that the defendant George White has at all times cooperated with the defendant Home Indemnity Company in the investigation of the accident, and in the defense of the action and has not breached any of the conditions of the policy upon his part to be performed [R. p. 183].

3. In finding that the defendant Home was not misled by any statements made to it by the defendant George White or by any fact reported to it by said George White and has not been in anywise prejudiced by any action or statement or omission of George White [R. p. 183].

4. In finding that it is the duty of the defendant Home to attempt to establish the truth of the statement of George White, that he was asleep and that the accident occurred while he was asleep and that said Home is estopped to assert the untruth of said statement or to assert by reason of said statement that he had failed to cooperate with it in the investigation of the defense of the claims made by the plaintiffs in said court actions [R. p. 184].

### Summary of Argument.

POINT I: The action being essentially equitable in character, the Appellate Court may on appeal review the sufficiency of the evidence to sustain the findings of fact upon which the judgment is based.

POINT II: Appellant argues that certain findings of the Honorable District Court upon which the conclusions of law and the judgment and decision are based, are against the clear weight of the testimony, particularly its finding that defendant White did cooperate with the defendant Home in the investigation of the accident and has not breached any of the conditions of the policy upon his part to be performed; in finding that defendant George White did not make any false, conflicting, misleading or inconsistent statements of fact; and in finding that defendant Home was not misled by any statement made to it by defendant White and has not been in anywise prejudiced by any action, statement or omission of defendant George White, and that there has been no breach by him of the conditions of the Home policy requiring cooperation as a condition precedent to coverage.

POINT III: Appellant argues that it cannot be estopped to assert the untruth of White's statements and that it was an error at law for the District Court to find and hold that the appellant is estopped to question the truth of White's statements, particularly in view of the reservation of rights under which it undertook the defense, and because it is not the duty of the appellant Home to maintain a defense in which it cannot in equity and good conscience believe.

POINT IV: Appellant argues that prejudice must be presumed as a matter of law from a breach of the cooperation clause of the Home's policy under the weight of authority both in the United States and the California State Courts.

## ARGUMENT.

### POINT I.

#### **This Court on Appeal May Review the Sufficiency of the Evidence to Sustain the Findings.**

Counsel for appellant are aware that the Circuit Court of Appeals will not overturn the findings of a trial court when they are supported by substantial evidence, but it is respectfully submitted that an appeal from a judgment in declaratory relief, being in effect a decree in equity, involves a review of the facts as well as the law. Such was the holding in *MacGowan v. Barber*, 127 F. (2d) 458.

In the case of *State Farm Mut. Automobile Ins. Co. v. Bonacci*, 111 F. (2d) 412, the Court defined "Cooperation" in the sense used in automobile liability policy requiring insured actively to co-operate with insurer in defense of damage action, stating that it required that the insured should make a fair and frank disclosure of information reasonably demanded by the insurer, to determine whether there is a genuine defense.

In reversing adverse judgment in which the plaintiff had appealed, the Court said (at page 414):

"It is urged that we are bound in this case by the findings of the lower court on these issues. Rule 52(a) of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c, is as follows: 'In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its actions. Request

for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.'

"The rule plainly contemplates a review by the appellate court of the sufficiency of the evidence to sustain the findings. If this were not true, the provision that requests for findings are not necessary 'for the purpose of review' would be meaningless. If the findings are clearly erroneous, the appellate court should set them aside, always giving due regard to the fact that the trial court had the opportunity of observing the witnesses. In *Simkins Federal Practice*, 3d Ed., page 488, in commenting on the effect of Rule 52(a), it is said:

'The new practice, now incorporated in the Civil Procedure Rules, accords with the decisions on the scope of the review in modern Federal equity practice, and applies to all cases tried without a jury, whether legal or equitable in character, and whether the finding is of a fact concerning which the testimony was conflicting or of a fact inferred from uncontradicted testimony.

'Under the new practice, where findings are made by the court without a jury, the appellate court is not limited to the mere question whether there is any substantial evidence to support them, but may set them aside if against the clear weight of the evidence, at

the same time giving full effect to the special qualification of the trial judge to pass on credibility.'

"The rule with reference to review of findings of fact in equity cases has often been announced by this court. *Johnson v. Umsted*, 8 Cir., 64 F. (2d) 316; *Koenig v. Oswald*, 8 Cir., 82 F. (2d) 85; *Lambert Lbr. Co. v. Jones Engineering & Constr. Co.*, 8 Cir., 47 F. (2d) 74; *Chicago, M., St. P. & P. R. Co. v. Flanders*, 8 Cir., 56 F. (2d) 114; *First National Bank v. Andresen*, 8 Cir., 57 F. (2d) 17; *United States v. Perry*, 8 Cir., 55 F. (2d) 819. In *Koenig v. Oswald*, *supra*, we reversed the findings of the lower court in a fraud case because they were deemed to be contrary to the weight of the evidence, even though they were sustained by the spoken word from the witness stand. While the findings of fact are presumptively correct, they are not conclusive on appeal, if against the clear weight of the evidence. In *Keller v. Potomac Electric Co.*, 261 U. S. 428, 43 S. Ct. 445, 449, 67 L. Ed. 731, the Supreme Court, in discussing procedure in an equity case, said: 'In that procedure, an appeal brings up the whole record and the appellate court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses.' "

## POINT II.

### **Certain of the Findings of Fact of the Honorable District Court Necessary to Sustain the Judgment Are Against the Clear Weight of the Evidence. (Specifications of Error I, II and III.)**

On July 22, 1946, at San Diego, California, defendant George White made an oral statement to Lionel E. Clifton and Thomas P. Menzies, representatives of the Home Indemnity Company [R. p. 382] that he had not been in an accident, had not struck anyone and had not known anything about an accident. On the next day, July 23, 1946, White made a sworn statement that he was not involved in any traffic accident [Rep. Tr. pp. 65, 67 and 68], having made statements to the same effect to the San Diego police officers when he was apprehended after the accident on July 20, 1946 [R. pp. 71, 72], and to Officer Hake who interviewed him after he had been taken to the police station, and to whom he said, "I know nothing of any accident," [R. p. 294]. Mr. White having subsequently decided, on the advice of counsel employed to represent him in the criminal case, to enter a plea of guilty to the criminal charge of violation of Section 480 of the State Vehicle Code, the plea was accordingly entered on July 31, 1946 [R. p. 321].

The effect of this plea was of course to admit that he had knowingly struck and injured a person and did not stop to render aid. Such a plea of guilty would be subsequently admissible in evidence on the trial of the civil



actions growing out of the accident as a declaration or admission against interest that the facts were as admitted. Such is the holding in *Langsley v. Obert*, 129 Cal. App. 214.

According to Mr. White's own testimony, his decision to plead guilty was arrived at after he had concluded from pictures that he saw of his car [R. p. 459] and from what Mr. Holt told him about human blood and flesh being found on his car and the imprints of clothing, that it must have been his car that was involved in the accident and that he had fallen asleep and that the accident must have happened then [R. p. 460].

He admitted that he had said nothing to the representatives of the Home on the 22nd and 23rd of July about having fallen asleep, because he "was quite sure that it was unimportant and that I wasn't involved in any accident. That is the reason I didn't tell them." [R. pp. 458, 459.]

Thus, White failed to reveal to the defendant Home a fact most material to its investigation of the accident, in spite of the fact that he had been arrested for violation of Section 480 of the California Vehicle Code and jailed under those charges [R. p. 293]; and in addition had been informed of the damage to the borrowed car he was driving, and that the car he was driving was under suspicion of having been involved in an accident resulting in the death of two persons. One wonders what he would have considered important.

Witness, Henry T. Briggs, who was driving northerly on Highway No. 101 at the scene of the accident, at an estimated distance of 100 feet from the scene of the impact, heard a thud, a screech of brakes and saw the bodies of the victims rolling toward his car [R. pp. 233, 234, 235]. He also heard "the sound of breaking glass and something rolling down the highway, like the inside of a grill fell out." [R. p. 235.]

Witness, Lonnie Lee Hawkins, heard "an awful screeching of brakes and an awful impact" from inside the kitchen of the cafe in which he was working, at a point estimated at a distance of 30 feet from the point of impact [R. pp. 252, 255, 256] and observed that the bodies were thrown from 60 to 80 feet from the point of impact which he identified by the broken glass, "I heard the screeching of brakes just a moment before the impact, and also someone screamed." [R. p. 255.]

From the effects of the collision between the bodies of the victims and White's car, fabric brush marks and an imprint of fabric material into the paint were found, which was identified with the clothing of one of the decedents [R. pp. 308, 309]. The force of the collision was sufficient to tear a heavy gauge metal steel fender [R. p. 311], and in the opinion of witness, Ray H. Pinker, of the crime investigation laboratory of the Los Angeles Police Department, the back of the shirt and the back and elbow area of the right arm of decedent Lee came over on top of the fender and scraped along the left side of the hood [Tr. p. 311]; that the force of the collision was relatively great, "It is the greatest amount of damage that I have ever observed in 17½ years of examination of vehicles

which were suspected of and by physical evidence proved to have struck human beings.” [R. p. 314].

It was the testimony of witness, Dr. Victor Parkin, that White could not pass through such an accident without being aware of it [R. p. 365], and that the “amount of the force, the noise created by the impact, and the transmission of the impulse to the individual would wake him up, unless he were, of course, very sound asleep or under the influence of alcohol.” [R. p. 366.]

Officer Luther M. Hake, who was called to the scene of the accident, found numerous pieces of the headlight lens and numerous pieces of pot metal from the headlight lens, and the headlight grill, and from the “parking lamp” [R. p. 288], and found that it was approximately 50 feet from the point of impact to where the body of the woman was found, and approximately 57 feet to where the body of the man was found [R. p. 291].

Notwithstanding this state of the record, defendant White testified that he knew nothing about the accident and that it must have happened when he dozed off [R. p. 460]. The lawyer who represented him in the criminal case “found it very hard to believe” [R. p. 463], a doubt which was shared by the probation officer of San Diego County, assigned to investigate the case in connection with White’s application for probation in the criminal proceedings [R. p. 374].

In the face of the foregoing the finding of the Honorable District Court that White did not in reporting the accident make any false, misleading or inconsistent statement of facts, must be taken to be against the clear weight of the evidence.

### POINT III.

**In View of the Reservation of Rights the Court Erred in Finding and Deciding That It Was the Duty of the Home to Establish the Truth of White's Statement, and That It Was Estopped to Assert a Breach of the Co-operation Clause. (Specification of Error IV.)**

The Honorable District Court found [R. p. 184] that:

“Having assumed said defense it was and is the duty of Home Indemnity Company of New York to attempt to establish the truth of the statement of George White, that he was asleep and did not know that the accident occurred, so long as said George White maintains that said statement is true, and that said Home Indemnity Company is estopped in this action to assert the untruth of said statement or to assert that by reason of said statement he has failed to cooperate with it in the investigation and defense of the claims made by the plaintiffs in said state court actions.”

It is respectfully submitted that this finding is clearly erroneous in view of the Agreement of Non-Waiver and Reservation of Rights, which was executed by defendant White prior to the undertaking of his defense by the Home (by counsel furnished by the Home) [R. pp. 171, 381], by the terms of which the defendant Home reserved its rights under the policy to any defense which it might have by reason of the terms and conditions thereof.

That an insurer which, before undertaking the defense of an action against an insured, expressly reserves its rights, does not waive defenses to the policy by so de-

fending the insured is fully substantiated by the authorities.

*U. S. F. & G. Co. v. Wyer*, 60 F. (2d) 856;

*Bowen v. Cote*, 69 F. (2d) 136;

*Eakle v. Hayes*, 185 Wash. 520 (55 P. (2d) 1072);

*Doolan v. U. S. F. & G. Co.*, 85 N. H. 531, 161 Atl. 39;

*State Farm Mutual Auto. Ins. Co. v. Phillips*, 210 Ind. 161 (2 N. E. (2d) 989).

The most serious objection to the finding is its effect of imposing upon counsel for the Home the duty of maintaining a defense of White based on his statement, regardless of the opinion of its credibility or bona fides, and to that extent it would appear to be open to the objection that it is contrary to the duty imposed upon counsel by Section 6068 of the Business & Professional Codes of California, Subsection (c), "Duties of an Attorney":

"It is the duty of an attorney \* \* \*

(c) to counsel or maintain such actions, proceedings or defense, only as appear to him legal or just, except as to a person charged with a public offense."

The oath of office prescribed by the Canons of Professional Ethics of the American Bar Association and the State of California imposes on counsel the duty:

"Not to counsel or maintain any suit or proceeding which shall appear to me to be unjust nor any defense except such as I believe to be honestly debatable under the law of the land;"

#### POINT IV.

**Prejudice Must Be Presumed as a Matter of Law  
From the Breach of the Co-operation Clause of  
the Home Policy Under the Weight of Authority  
Both in the United States and the California  
State Courts.**

Prior to the decision of the State Supreme Court in *Valladao v. Fireman's Fund Indemnity Co.* (1939), 13 Cal. (2d) 322, a number of Appellate Court cases adhered to the proposition that it was necessary for the insurer to show that it was substantially prejudiced by the assured's failure to co-operate as required by the policy.

*Panhans v. Associated Indemnity Corp.*, 8 Cal. App. (2d) 532;

*Norton v. Central Surety & Ins. Co.*, 9 Cal. App. (2d) 598;

*Jensen v. Eureka Casualty Co.*, 10 Cal. App. (2d) 706;

*Wormington v. Associated Indemnity Co.*, 13 Cal. App. (2d) 321.

But in *Valladao v. Fireman's Fund Indemnity Co.*, 13 Cal. (2d) 322, the Court although declining to determine definitely whether as an abstract proposition, an insurer must make a showing of prejudice resulting from an alleged breach of the co-operation clause, concluded from an examination of the record of the case under consideration that as a matter of law, prejudice would be presumed from the substantial and willful breach by the assured of the material co-operation clause in the policy, it appearing that the assured had repeatedly and willfully misrepresented to the insurer over a period of several

months that he was not driving the automobile insured at the time of the accident.

The Court also discussed the cases of *Hynding v. Home Accident Insurance Company*, 214 Cal. 743, and *Purefoy v. Pacific Auto. Indem. Exch.*, 5 Cal. (2d) 81 (which had been cited in some of the Appellate Court's decisions as authority for the ruling that it was necessary for the insurer to show that it had been prejudiced because of a breach of the co-operation clause), saying that in the *Hynding* case the question of the necessity of showing of prejudice was only briefly and incidentally discussed and was unnecessary to the disposition of the question in issue. Further, that in the *Purefoy* case the Court had likewise declined to determine the necessity of a showing of prejudice, because from the facts, prejudice sufficiently appears, the Court (in the *Valladao* case) saying:

“The decision in the *Purefoy* case then proceeds to point out that prejudice must be presumed from the failure of the assured therein to notify the insurer of the accident for a period of a year and three months (though it learned of the accident from the injured person three and one-half months thereafter) because such conduct precluded prompt investigation of the accident. It was also stated to be immaterial that the assured, after giving such belated notice offered to co-operate and that counsel for the injured person gave the insurer full opportunity to defend, of which it did avail itself. The insurer was said to be ‘entitled to rely on a substantial breach of so material a condition of its policy’.”

The conclusion reached in the *Valladao v. Fireman's Fund Indemnity Co.*, 13 Cal. (2d) 322, was followed in

the recent Appellate Court case of *Margellini v. Pacific Auto. Insurance Co.*, 33 Cal. App. (2d) 93, and *Wright v. Farmers Auto. Inter-Insurance Exchange*, 39 Cal. App. (2d) 70. From the facts in those cases, it was not necessary to determine whether an insurer must affirmatively show that prejudice resulted from the breach of the co-operation clause, but as in the *Valladao* case, it was said that (*Margellini* case) “as a matter of law prejudice must be presumed from the substantial and willful breach by the insured of the material co-operation clause of the policy.”

The Court said at page 97:

“That a condition of a policy requiring the co-operation and assistance of assured in opposing a claim made, or an action brought, by an injured party is material to the risk and of the utmost practical importance; that without such cooperation and assistance the insurer is severely handicapped and may be precluded from making any defense; and that the insurer is entitled to know from its assured the true facts concerning the accident, in order that it may determine for itself whether to contest or attempt to settle the claim.”

The Court said further at page 99:

“If it be assumed that any information which could have been furnished, in response to the appellant’s request, would have disclosed or led to the discovery of the fact that no defense existed, that very fact would have shown the desirability of settling the claim.”



It may be noted that an application by the respondent to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court in the *Margellini* case on July 24, 1939.

In *Miller v. Union Indemnity Co.*, 209 App. Div., 455, 204 N. Y. Supp., 730, the Court said:

“It is of no relevancy that the claim against the respondent (assured) was a valid one, and one which, in the ordinary course, if the conditions of the policy had been complied with, the appellant company (insurer) would ultimately have been obliged to pay. Such conditions would be robbed of nearly all practical value if, in applying them, the question of the validity of the professed claim must be investigated.”

In *Buffalo v. United States Fidelity & Guaranty Co.*, 84 F. (2d) 883, the Court said at page 884:

“The third defense alleges the facts constituting a breach of the co-operation clause in the language used in the answer in the *Wyer* case. By standing on his demurrer, plaintiff admits those facts to be true. Our decision in the *Wyer* case, even if not an adjudication against *Buffalo*, is controlling under the doctrine of stare decisis. Plaintiff argues that if such be the law, no recovery can ever be had on a liability policy unless the insured admits liability at the outset; that if insured’s version of the accident exculpates him from liability, and the jury believes that version, there is no judgment against him and hence no liability on the policy; if the jury does not accept his version, then the company is not liable because of the breach of the co-operation clause. Therefore, plaintiff concludes, an insured gets no

protection for the premium he pays. We do not construe the *Wyer* case as enabling a company to avoid liability simply because a jury does not accept insured's version of the accident, nor if the insured is honestly mistaken in his statements as to the accident or omits therefrom some relevant circumstances. *The company is entitled, however, to an honest statement by the insured of the pertinent circumstances surrounding the accident, as he remembers them. Lacking that, the company is deprived of the opportunity to negotiate a settlement, or to defend upon the solid ground of fact. Nothing is more dangerous than a client who deliberately falsifies the facts.* The allegation in the answer here is that *Buffalo* 'willfully misrepresented' the facts. And if *Buffalo* and *Jelley* were in the car when the collision occurred he did willfully falsify when he gave a long and detailed account of his presence at other places. There can be no suggestion here of faulty memory or mistaken version. If *Buffalo* was in the car when this terrible accident happened, he would remember it; if he was in the car his statement and his testimony that his car had been stolen and that he was not near the accident until after the collision is a deliberate premeditated piece of perjury, and he should not recover. If his statement and testimony twice repeated are true, then his policy does not cover the loss, as alleged in the fourth defense. The demurrer was properly overruled to the third and fourth defenses, each of these being a complete defense in itself, whether the other defenses pleaded are good in law is a matter of no consequence.

The judgment is affirmed."

### Conclusion.

It is respectfully submitted that the finding and decision of the Honorable District Court that there was no breach of the co-operation clause of Home's policy by defendant White, and that he did not make any false and misleading statements to the Home, and that the Home was not prejudiced by any action, statement or omission of defendant White, is against the clear weight of the evidence; that by his false and misleading statements the Home was not only delayed and prejudiced in its investigation of the case, but was deprived of the opportunity of determining at the time whether the case should be settled or contested; that the Home is particularly prejudiced in the defense of the civil actions growing out of the accident by reason of White's plea of guilty to the charge of violation of the provisions of Section 480 of the Vehicle Code of the State of California and the resulting admission that he had knowingly struck and injured the victims and did not stop to render aid, and by the extent to which White's testimony on the trial of the civil actions would be subject to impeachment by his various conflicting statements; and finally, it is respectfully urged that the Honorable District Court erred in finding and deciding that, notwithstanding the reservation of rights, it was the duty of the Home to attempt to establish the truth of White's various conflicting statements and that it was estopped to assert a breach by White of the co-operation clause of its policy.

It is respectfully submitted that upon the record presented and the points and authorities cited above that the judgment should be reversed.

Respectfully submitted,

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By HAROLD L. WATT,

*Attorneys for Appellant, Home Indemnity Company of  
New York.*

No. 11661

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

HOME INDEMNITY COMPANY OF NEW YORK, a corpora-  
tion,

*Appellant,*

*vs.*

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT,  
a corporation, *et al.*,

*Appellees.*

---

BRIEF OF APPELLEE STANDARD ACCIDENT  
INSURANCE COMPANY OF DETROIT.

---

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No. 11661

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

HOME INDEMNITY COMPANY OF NEW YORK, a corporation,

*Appellant,*

*vs.*

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT,  
a corporation, *et al.*,

*Appellees.*

---

## BRIEF OF APPELLEE STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT.

---

### Jurisdiction.

Appellee, Standard Accident Insurance Company of Detroit, a corporation, herein referred to as "Standard," is in full accord with the statement in appellant's brief as to the grounds and statutory provisions which sustain the jurisdiction of the District Court to render the judgment herein appealed from and of this court upon appeal to review said judgment.

### Sole Question Involved.

Only one question is involved on this appeal.

*Can an insurer disclaim liability upon the ground of failure of its assured to cooperate, not by proving that the assured gave it a statement showing the existence of certain facts and then later admitted they were not true or testified to a contrary statement of facts, but by using its confidential position to obtain and introduce evidence which, if believed, would prove that the assured's version of the accident was not true?*

### Statement of the Case.

The "Statement of the Case" contained in appellant's brief relating to the issuance of the policies of insurance by the appellant and this appellee and the quoted provisions of each policy found therein is correct. But the appellant's "Statement of the Case" is objected to by this appellee because it fails to include the most vital facts disclosed by the evidence. It is obvious that appellant has included in its statement only those facts which tend to favor its contention and has conspicuously omitted certain important facts upon which Finding Number 7 is based. [R. pp. 177-178.]

It would appear from reading appellant's Statement of the Case, particularly page 7 of appellant's brief, that prior to appellant's counsel tendering (on August 23rd) an answer denying the occurrence of the accident, neither White nor anyone on his behalf advised appellant that he had

fallen asleep and that the accident may have occurred while he was asleep. The evidence clearly establishes that White did so advise appellant prior to July 31st, and, if White's testimony is to be believed, appellant was so advised the same day he made his sworn statement, on the afternoon of July 23rd [R. p. 459], of the fact that he believed he must have fallen asleep and the accident could have occurred while he was asleep.

Appellant also fails to include the following facts:

That its Claims Manager, Mr. Lionel E. Clifton, and its attorney, Mr. Menzies, on July 23, 1946, examined the automobile insured by it [R. p. 388] and that at least Mr. Menzies attended the inquest held in San Diego that day and there questioned a witness. [R. p. 243.]

That Mr. Clifton interviewed witnesses near the scene of the accident the following day and was advised by Mr. Menzies that the automobile had human blood and flesh on it. [R. pp. 402-403.]

That appellant employed a consulting physicist to determine the extent of the physical damage and whether or not the car had collided with some fixed object or with another vehicle or human being. [R. p. 352.]

That White advised appellant's representatives prior to July 31, 1946, that he was going to plead guilty to violating section 480 of the California Vehicle Code [R. p. 383] and that Mr. Holt, his attorney, on July 29, 1946, advised Mr. Menzies the reasons that such a plea was to be en-

tered [R. p. 324], which reasons showed that the plea was not an admission by White that at the time of the accident he was conscious of being involved therein.

That appellant concluded no later than July 31, 1946, that the automobile it insured, and which had been driven by White, struck and killed the two pedestrians. [R. pp. 395-396, 429-430.]

That a discussion relative to a compromise of one of the actions filed in the Superior Court was held on July 30, 1946, between appellants Mr. Clifton, Mr. Barr, of the Barr Adjustment Company, and Mr. John B. Lonergan, the attorney representing two of the heirs. [R. p. 444.]

That appellant's attorney, Mr. Menzies, did not on August 14, 1946 [R. p. 440], believe White would sign an answer denying that he was involved in the accident and that thereafter, on August 15, 1946, he nevertheless submitted to White for signature answers denying White was involved in the accident. [R. p. 125.]

## Summary of Argument.

### POINT I.

WHILE THIS COURT OF APPEAL MAY REVIEW THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE FINDINGS OF FACT, THEY WILL NOT BE SET ASIDE UNLESS CLEARLY ERRONEOUS AND DUE REGARD SHALL BE GIVEN TO THE OPPORTUNITY OF THE TRIAL COURT TO JUDGE OF THE CREDIBILITY OF THE WITNESSES.

### POINT II.

THE EVIDENCE CLEARLY SUSTAINS ALL FINDINGS OF FACT ATTACKED BY APPELLANT AND ESTABLISHES THAT APPELLANT WAS NOT MISLED OR PREJUDICED BY ANY STATEMENT MADE BY WHITE, HAVING MADE AN IMMEDIATE AND COMPLETE INDEPENDENT INVESTIGATION OF THE FACTS OF THE ACCIDENT.

### POINT III.

THE RESERVATION OF RIGHTS AGREEMENT DID NOT RELIEVE APPELLANT FROM THE DUTY OF ESTABLISHING THE TRUTH OF ITS INSURED'S STATEMENT AND THE DEFENSE OF ITS INSURED WOULD NOT VIOLATE ANY CODE OF PROFESSIONAL ETHICS.

### POINT IV.

THERE WAS NO BREACH OF THE COOPERATION CLAUSE AND APPELLANT WAS NOT PREJUDICED BY WHITE'S STATEMENTS.

The chronological sequence of events is important to the decision of this appeal in that it shows how quickly all important facts were disclosed to appellant and how thereafter appellant sought to entrap White into a breach of the cooperation clause of its policy. They are, therefore, set forth in the table below.

### Chronological Table of Events.

July 20, 1946—10 p. m. Automobile accident occurs in San Diego County, fatally injuring Mr. and Mrs. Claude McLester Lee. [231.]\*

10:37 p. m. Patrolmen Hake and McCreary received radio call to investigate the accident. [286.]

10:50 p. m. White stopped as he approached San Diego by police officer [268-9] and taken to San Diego police station [270] where the automobile is photographed. [273.]

After 11 p. m. White arrested for violation section 480, California Vehicle Code. [69, 293.]

July 21, 1946—9:30 a. m. White released on bail. [71.]

July 22, 1946—*Fitzgerald, et al. v. White, et al.*, filed in San Diego County Superior Court. [178, Finding No. 8.]

3:00 p. m. Statement of Walter Haggarty, President of named insured, taken at Beverly Hills Hotel by Mr. Menzies. [52, Answer No. 4; 56.]

9:00 p. m. Oral statement given by White to Mr. Menzies and Mr. Clifton. [ 381, 382, 387.]

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\*All references are to Transcript of Record.



July 23, 1946—Insured automobile examined by Mr. Menzies and Mr. Clifton [388] and inquest attended by Mr. Menzies [243] and part thereof by Mr. Clifton. [384.]

11:00 a. m. Sworn statement of White taken by Mr. Menzies and Mr. Clifton. [382-3, 58, 77.]

Afternoon—White advised Mr. Menzies he may have fallen asleep and accident may have happened then. [459.]

July 24, 1946—Mr. Clifton interviews witnesses near scene of accident [402, 403] and is advised by Mr. Menzies that the automobile had human blood and flesh on it. [403.]

July 26, 1946—Wm. W. Harper, consulting physicist, hired by Home “to determine the extent of the physical damage, and then at that time to determine whether or not the car had collided with some fixed object or with another vehicle, or human beings.” [352.]

Reservation of rights agreement [381] executed by Home and White. [383.]

White advises Mr. Menzies and Mr. Clifton he is going to plead guilty to violating section 480 of the California Vehicle Code. [383.]

July 29, 1946—Attorney Holt advises Menzies reason for plea of guilty. [324.]

July 31, 1946—White pleads guilty. [321, 325.]

August 6, 1946—*Lee v. White, et al.* filed in San Diego County Superior Court. [179, Finding No. 9.]

August 15, 1946—Answers to Superior Court actions against White [107, 116], *denying* White involved in accident, prepared by Mr. Menzies and sent to White for verification. [125, 135, Admission No. 15.]

August 23, 1946—Answers *admitting* White involved in accident [110, 119] are sent to Mr. Menzies [131] and thereafter filed by Mr. Menzies [110 and 134, Admission No. 5; 119 and 135, Admission No. 11]; later Mr. Menzies motioned to withdraw as attorney for White. [434.]

August 26, 1946—Home denies liability in both cases. [157.]

## ARGUMENT.

### POINT I.

**While This Court on Appeal May Review the Sufficiency of the Evidence to Sustain the Findings of Fact, They Will Not Be Set Aside Unless Clearly Erroneous and Due Regard Shall Be Given to the Opportunity of the Trial Court to Judge of the Credibility of the Witnesses.**

Rule 52(a) of the Rules of Civil Procedure, 28 U. S. C. A. following Section 723c, is as follows:

“In all actions tried upon the facts without a jury the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its actions. Request for findings are not necessary for purposes of review. *Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.* The findings of a master to the extent that the court adopts them, shall be considered as the findings of the court.” (Emphasis added.)

Standard contends, and will show, that the evidence abundantly supports the findings of fact and the judgment of the trial court made after it had full opportunity to hear all of the evidence and judge of the credibility of all witnesses who testified in this case. It is submitted that the evidence would not have supported different findings of fact or judgment than those entered.

A. APPELLANT'S CASES DISTINGUISHED.

In the case of *State Farm Mutual Automobile Insurance Co. v. Bonacci* (1940) (C. C. A. 8), 111 F. (2d) 412, the court says, at page 415:

“The facts largely relied upon in this case consist of testimony and written statements given or made by the defendants, not in the presence of the lower court, but in the course of the trial of the damage actions in the state court. The lower court, as to such evidence, had no better opportunity of judging the credibility of the witnesses than does the appellate court.”

In the case at bar the witnesses personally appeared before the trial court and it had full and complete opportunity to judge their credibility. It was the duty of the trial court, where it found that there was some conflict in the evidence, to determine which witnesses were entitled to credence and which were not, and to render its findings and judgment in accordance with the testimony and evidence it determined was most worthy of belief.

Appellant, in effect, asks this court to accept the evidence introduced at the trial which tends to contradict the findings and judgment and which was rejected by the trial court. This would be contrary to Rule 52(a) of the Rules of Civil Procedure and the basic rule announced in the cited case.

*Cherry-Burrell v. Thatcher* (1939) (C. C. A. 9), 107 F. (2d) 65, 69;

*Continental Oil Co. v. Jones* (1940) (C. C. A. 10), 113 F. (2d) 557, 564. Cert. denied 311 U. S. 687, 61 S. Ct. 64.

Further, in the *Bonacci* case, the court says, at page 414:

“The policy also contains the provision that it should be void in the case of any ‘fraud, attempted fraud, or false swearing by the Assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.’”

A careful reading of the policy issued by appellant fails to disclose any provision such as that quoted above. [R. pp. 25-30.]

Also, on page 414:

“The contract here requires that the insured ‘actively cooperate,’ and in that regard this requirement is at least more emphatic and definite than a policy simply requiring that the insured ‘cooperate.’” (Emphasis by the court.)

There is no such provision for *active* cooperation found in the policy issued by appellant. [App. Br. pp. 3-4; R. pp. 25-30.]

The other case cited, *MacGowan v. Barber* (1942) (C. C. A. 2), 127 F. (2d) 458, merely announces the rule that on appeal from a judgment in declaratory relief, being in effect a decree in equity, the appellate court may review the facts as well as the law.

## POINT II.

**The Evidence Clearly Sustains Findings of Fact Numbered 16, 17 and 18, Attacked Under This Point, and Which Are Appellant's Specifications of Error Numbered 1, 2 and 3.**

The first Specification of Error, and apparently the only one relied upon in the argument under this point, attacks Finding No. 17. It will be shown in subsequent argument by this appellee, under this point and in answer to the other points raised by appellant, that the evidence fully sustains all three findings.

No attack is made on Finding number 7. Finding number 7 [R. p. 177] is as follows:

"7. The court finds that after the occurrence of said accident, on or about the 23rd day of July, 1946, George White reported said accident to defendant, Home Indemnity Company of New York, but reported that he had not been involved in any accident upon the 20th day of July, 1946, while driving the said Lincoln automobile; that after the 23rd day of July, 1946, and prior to the 31st day of July, 1946, said defendant George White further reported to said Home Indemnity Company of New York that he had fallen asleep while driving said Lincoln automobile on the 20th day of July, 1946, and that the accident in which the aforesaid persons were killed must have happened at that time, and that he, said George White, intended to enter a plea of guilty to a charge brought against him by the People of the State of California that he had failed to stop and render aid at the time of said accident; that thereafter and prior to the 14th day of August, 1946, George White, by and through his attorney, John T. Holt, Esq., did advise the defend-

ant, Home Indemnity Company of New York, that he could not deny that it was the Lincoln automobile driven by him as aforesaid which had struck and killed the said Claude McLester Lee and Leana Mae Osborne Lee, and again advised said defendant Home Indemnity Company of New York that he had fallen asleep and did not know of the occurrence of the accident, but because of the damage to said Lincoln automobile and other facts which were then known to defendant George White and defendant Home Indemnity Company, he believed that it was said Lincoln automobile driven by him which had been involved in said accident and caused the death of said persons.

“The court further finds that all of said reports made by defendant George White to defendant Home Indemnity Company were oral, but that defendant, Home Indemnity Company of New York, requested said oral reports and acted thereon and waived the making of any written report by the defendant George White.”

It is submitted that the evidence amply sustains and upholds both findings and that Finding number 7 fully explains Finding number 17. The evidence and the findings clearly establish that appellee, George White, hereafter referred to as “White,” on Saturday, July 20, 1946, about 10 o'clock P. M., while driving the Lincoln automobile insured under appellant's policy, became involved in an accident in San Diego County, California. At 10:45 P. M. the same evening White was stopped by officer Cassin as the former was approaching the City of San Diego [R. pp. 286-7] and after some conversation with the officer he was taken, without objection, to the police station in that city. [R. pp. 270-277.] When first

stopped, and at the police station, White denied being involved in any accident and upon arrival at the police station he got out of the automobile, without looking at any damage that had been done to the automobile, as he knew it had been previously damaged that day at the Inglewood Race Track. [R. p. 456.] He went into the police station with the officer. [R. pp. 456, 457.] As he stood in the station doorway he observed pictures being taken of the automobile but did not at that time observe the damage to the car. [R. pp. 273, 284, 373, 457, 458.] There is no evidence that he returned to the automobile or again saw it after being arrested at the police station for an alleged violation of section 480 of the California Vehicle Code. [R. p. 458.]

A. APPELLANT NOT MISLED BY WHITE'S STATEMENT  
THAT HE DID NOT KNOW HE WAS INVOLVED IN  
AN ACCIDENT.

On July 23, 1946, White gave a sworn statement to Lionel E. Clifton, Claims Manager for appellant, and Thomas P. Menzies, one of its attorneys, that he had not been involved in an accident and the automobile he was driving had not struck anyone "that I know of." This was repeated at least three times. [R. p. 53, Ans. No. 10; pp. 67-68.] The previous day he had made an oral statement to the same effect. [R. p. 387.] White also stated to Mr. Menzies and Mr. Clifton that he had been arrested for having been involved in the automobile accident in question and informed them of all of the details and accusations leading up to and surrounding the formal arrest. [R. p. 53; Ans. No. 10; pp. 70-71.]



Appellant contends that these were false, conflicting, misleading and inconsistent statements of fact in view of White's subsequent statement that, from evidence later brought to his attention (including photographs of the automobile and the fact that blood, flesh, and the imprint of clothing were found on it [R. pp. 459-460]), he concluded that his automobile must have hit the pedestrians, although at the time of the accident he had no knowledge of having hit them. Clearly, these statements by White were not false or conflicting or misleading or inconsistent because in answer to appellant's question he repeated three times, explaining, "Not that I know of." [R. p. 53; Ans. No. 10; pp. 67-68.] This conclusively shows that White merely stated that which was in his mind at the time, that is, no consciousness of having been involved in the accident. This statement and the later explanation amount to a statement: "I had no accident that I was conscious of, but I did fall asleep, and the damage to my car and the fact that blood and flesh were found on it and the imprint of one of the pedestrian's clothing found on it demonstrate to me that I did strike these pedestrians and therefore it must have occurred when I was asleep."

Appellant was advised by White after he had obtained knowledge of further facts that he believed that the accident could have occurred while he was asleep. *There is positive evidence in the record that White did notify appellant of this fact on the afternoon of July 23rd, following the giving of the sworn statement referred to above.* White testified that at the time he made his oral report and at the time he gave his sworn statement, he had not yet seen any pictures of the damage to the car

and that he first saw them on the afternoon of July 23rd, testifying:

“Q. About when? A. I think it was the same day I gave the statement with the reporter there. *I think it was later that afternoon that Mr. Menzies showed me the newspapers that had the pictures of the car in it, and the minute I saw those pictures I said, ‘The car was not damaged in that manner, and if that is the car that hit them, it must have happened when I fell asleep.’*”

Q. Did you then tell them that you fell asleep?  
A. Yes, sir.” [R. p. 459.] (Emphasis added.)

White testified that he again advised Mr. Menzies and told Mr. Watt, another attorney for the appellant, and Mr. Clifton, in Mr. Menzies’ office in Los Angeles, on July 26, 1946, “about having fallen asleep and that I wanted to insert that in there, in that transcript, and he didn’t seem to want to do that.” [R. p. 466.] The transcript referred to is the sworn statement given by White on July 23, 1946, to Mr. Menzies and Mr. Clifton in San Diego.

Further, Mr. John T. Holt, the attorney representing White in the criminal proceedings arising out of the accident, testified that between July 26 and July 31, 1946, he had a telephone conversation with Mr. Thomas P. Menzies. *Mr. Holt at that time advised Mr. Menzies that White claimed he must have fallen asleep and further:*

“Then I said, ‘By the way, how about that transcript? He wants to change that statement.’”

And Tom said, *‘Oh, no,’ he said, ‘We have got him over a barrell. He didn’t tell us he fell asleep in the written statement.’*

I said, 'He told you the next day.'

He said, '*That doesn't make any difference*, you haven't read the case,' and he gave me some case, which I didn't read, although I might have become better versed in the law if I had, and I said, 'Tom, I haven't read the case, but you don't mean to tell me if you aren't prejudiced at all, and if you knew a particular phase after the first statement was given, and the first statement is given when a man is excited and shocked, that you wouldn't permit him to change it?'

He said, 'I have got the law, and you better read it.' " [R. pp. 322-323.] (Emphasis added.)

Mr. Thomas P. Menzies testified that *on July 29, 1946*, attorney Holt had advised him, "I am telling you now that he must have fallen asleep and he might have hit them while he was asleep" [R. p. 422], and asked that this be incorporated in White's first sworn statement. [R. p. 423.]

When asked the specific question by counsel for this appellee, "Didn't he say that White said that, *that he had fallen asleep?*" Mr. Menzies replied, "He may have. I am not sure of that. *Yes, I think he did*, Paul," and I said, 'Well, that is diametrically opposed to what he told us.' I said, 'He denied to us that he was never in an automobile accident.' " [R. p. 422.] (Emphasis added.)

#### B. APPELLANT MAKES IMMEDIATE AND COMPLETE INVESTIGATION OF ACCIDENT.

The record is replete with evidence that immediately upon being notified of the happening of the accident appellant, on July 22, 1946, took a written statement from Mr. Walter Haggerty, one of the named insureds [R. pp.

52, 56] and president of the other named insured Northumberland Mining Co. Mr. Menzies and Mr. Clifton, on the same day, went to San Diego for the purpose of securing, and did secure, a statement from White. A further statement was given by White the next day. [R. pp. 58, 77.] They inspected the automobile involved in the accident before taking the sworn statement [R. pp. 387-8] and attended the Coroner's inquest July 23, 1946, at least to the extent of Mr. Menzies questioning one of the witnesses. [R. pp. 243, 384.] They proceeded to investigate the facts and circumstances of the accident, including the taking of statements on July 24, 1946, from witnesses near the scene of the accident. [R. p. 402.] They did everything that could be undertaken in order to be fully advised, including the employment on July 26th of one William W. Harper, a consulting physicist, "To determine the extent of the physical damage, and then at that time to determine whether or not the car had collided with some fixed object or with another vehicle, or with human beings." [R. p. 352.] *Appellant did not disclaim liability until August 26, 1946.* [R. p. 157.]

C. WHITE'S PLEA OF GUILTY DID NOT ALTER THE APPELLANT'S RELATION TO ITS ASSURED.

Appellant contends in its brief (App. Br. p. 27) that it was particularly prejudiced and the cooperation clause of its policy was breached by White's plea of guilty to the charge of violating section 480 of the Vehicle Code of the State of California. It also contends that this plea constituted an admission by White that he had knowingly struck and injured the pedestrians.

Appellant was advised as early as July 26th that White intended to plead guilty to the criminal charges [R. pp.

383, 420, 461.] On July 29th John T. Holt, the attorney representing White in the criminal action, advised Mr. Menzies that he was going to have White plead guilty to the hit and run charges for the reason that if he did so the District Attorney would move to dismiss the manslaughter charges and would not oppose probation, and, further, he (Mr. Holt) felt that many times notable or prominent people did not receive a fair jury trial and that jurors were oftentimes prejudiced against them. [R. p. 324.] White testified in the court below as to his reasons for pleading guilty to the criminal charge. [R. p. 463.] Before the plea was entered appellant was fully aware of the reasons for pleading guilty to the criminal charge. [R. p. 324.]

The fact that White pleaded guilty to the criminal charge would have, if left unexplained, undoubtedly constituted evidence of the admission by him that he knew the accident had occurred for knowledge that an accident had occurred was an essential to the crime to which he had pleaded guilty. But the inference thus raised is not conclusive, and the evidence here shows without dispute that White pleaded guilty solely on the advice of his attorney and because his attorney believed (1) that he could secure a dismissal of the manslaughter charges (in which he was successful) [R. p. 327] and (2) because it was his attorney's opinion that a jury would not believe White's story (although he himself believed it) and that a jury is oftentimes prejudiced against notable or prominent people, and (3) if the State were put to the expense of a jury trial, the court might be more severe, and (4) he felt that probation could be secured if a plea of guilty were entered. [R. p. 463.] *The inference, therefore, which might otherwise be drawn from the plea of guilty is entirely dispelled.*

D. THERE BEING NO BREACH OF THE COOPERATION  
CLAUSE APPELLANT CAN SHOW NO PREJUDICE.

How can it be seriously contended that appellant was misled or in any manner prejudiced by any statement of fact given by White? Appellant has not pointed to any evidence in the record, and there is none to be found, that would substantiate such a claim. If appellant had been misled or prejudiced certainly it could have offered evidence to establish that fact. It offered none. To the contrary, it presented only evidence which establishes a full compliance by White with the conditions of the policy and particularly the cooperation clause thereof. Its effort to show imaginary inconsistencies in White's statements is not material in this action as whether or not any inconsistency existed would be a matter to be determined in the State court, if it ever became an issue, and not upon this appeal.

Appellant admits it knew the proper persons with whom to negotiate a compromise [R. p. 441] and it has been demonstrated appellant made a full investigation of all of the facts of the accident. The activities of the appellant indicate a plan or scheme to find some loophole by which it could escape its just burden and obligation. All of the acts, conduct and efforts of the representatives of the appellant following the taking of the statement on July 23, 1946, unerringly point to an endeavor by appellant to secure evidence to prove that White was mistaken at the time he gave his oral report on July 22, 1946, and the sworn statement on July 23rd, rather than an endeavor to substantiate his theory as to how the accident

occurred. And all this while the insured believed the insurer was protecting his interests under its obligation to “defend in his name and behalf any suit against the insured . . .” [Insuring Agreement II; R. p. 26.] Clearly under the facts as revealed by the record in this case appellant cannot be relieved of its just duty to defend and indemnify White in the actions now pending in the Superior Court of the State of California in and for the County of San Diego. Its duty is to defend its insured or compromise the litigation.

This court certainly will not place its stamp of approval on the conduct of the appellant. To do so will be to permit any insurance company to receive a report from its assured as to the fact that an accident had occurred and then turn around and use its position and facilities to investigate in order to secure only evidence that would contradict the assured’s statements and which, if believed, would make the assured’s version untrue and then claim lack of cooperation. The insurer could never be the loser, if that is to be permitted. Did appellant perform its part of the insurance contract? No. How can it justly claim it has no obligation or owes no duty to White?

Appellant in effect accuses White of bad faith by his failure to advise it, when he first talked to Mr. Menzies and Mr. Clifton that he had fallen asleep and the accident may have occurred at that time even though he did so advise appellant the next day or at most a few days thereafter. But the record reveals exactly the opposite and

indicates that appellant rather than White was guilty of bad faith, because the important events occurred in the following sequence:

(1) White made an initial statement to appellant on July 22-23, 1946.

(2) Almost immediately thereafter appellant was advised of the fact that White may have fallen asleep and the accident occurred then.

(3) Appellant made an immediate and complete investigation of the accident.

(4) Then appellant prepared for White's signature a non-waiver agreement and reservation of rights, which was executed by both parties.

(5) Appellant concluded the automobile it insured was the one involved in the accident.

(6) Appellant then tendered false answers to White, knowing them to be false and believing that White would not sign them, in that they denied that White was involved in the accident. [R. p. 398.]

(7) Truthful answers, admitting the occurrence of the accident were executed by White and forwarded to Mr. Menzies on August 23rd and soon thereafter filed by him.

(8) After White's refusal to execute false answers appellant denied liability under its policy, on August 26, 1946, over a month after the date of the accident.

(9) Mr. Menzies withdrew as counsel for Mr. White.



### POINT III.

#### **The Reservation of Rights Agreement Did Not Relieve Appellant From the Duty of Establishing the Truth of White's Statement.**

The agreement of non-waiver and reservation of rights [R. p. 171] was executed July 26, 1946. It merely provides that neither White nor Home, by execution of the agreement or further investigation by Home, waived or invalidated any right which either may have under the policy. This is not an unusual form of agreement or method to follow where there is some question in the insurer's mind as to some possible breach by the assured of one or more of the conditions of the policy. It merely means, as its terms show, that the determination of whether there has been a breach or not will be postponed until some future date.

All other rights, duties, obligations and relations between the insured and the insurer remain the same as if no breach were ever claimed. It was, therefore the duty and obligation of Home to proceed with its investigation and to attempt to establish the truth of White's assertions and to represent his interests in every way and with the same enthusiasm as if no breach had been claimed.

The confidential relationship existing between White and the representatives of Home continued after the execution of the reservation the same as it did before. Certainly, until the Home had expressly and unequivocally notified White to the contrary, he had every right to believe that every action taken by Home would be in the

protection of his interests and in the establishment of his defense rather than the contrary, and, further, that counsel and agents furnished by Home would in fact as well as in theory act as his representatives and not adverse to his interests. To hold otherwise would be to permit the insurer to lead the insured into a sense of false security by believing that everything was being done to protect his interests, little realizing that in fact the insurer was doing everything it could to completely discredit him and prove his statement to be untrue and then to claim that there was no liability or obligation under the policy because of the insured's conduct.

That White had ample ground for such a belief is shown by his testimony, as follows:

“Q. When they came to see you in San Diego, what did they say as to whom they were representing, or what their capacity was when they called on you? A. You mean when I first saw them in San Diego?

Q. Yes. A. That I remember distinctly, Mr. Menzies, saying, ‘We are here to help you.’ He said, ‘You couldn’t hire me for a million dollars, but we are here to help you all we can,’ and so forth, ‘and we are very, very cordial.’ And we talked and talked about the accident. \* \* \*

Q. By Mr. Nourse: Please, Mr. White, what did he say? A. That they were going to help me all they could, and look after the case, look after my interests in the case.” [R. p. 465.]

In *Pennix v. Winton* (1943), 61 Cal. App. (2d) 761, 145 P. (2d) 561 (hearing denied by Supreme Court), counsel employed by the defendant's insurer became convinced before or during the trial of a damage action that

the insured and the plaintiff were in collusion and that the insured was desirous of having the plaintiff (insured's guest passengers) recover damages. Throughout the trial and during the argument to the jury the acts and conduct of counsel clearly indicated that he did not believe his client and that there was collusion. In granting a new trial upon the ground of such misconduct, the court says, at pages 774, 775:

“Counsel cannot serve two masters and he can only properly represent the defendant so long as his duties as counsel for defendant do not conflict with his duties as counsel for the insurance carrier. . . . On the question under discussion, we are of the opinion that counsel for defendant was guilty of misconduct in continuing to act as counsel for defendant while acting, as above indicated, and as admitted by counsel, solely in the interests of the insurance carrier.”

There is in reality no valid distinction between the case at bar and the cited case. The defendant in both cases had every right and reason to believe, until notified to the contrary, and until counsel furnished by the insurance carrier had withdrawn from the case, that every effort would be made to substantiate and advance his defense rather than to tear it down. The fact that counsel furnished by Home withdrew after August 23, 1946, over one month after the accident, is no justification for appellant's prior efforts to disprove White's version of the accident. It is elementary that once an attorney has accepted the defense of an action it is his duty to represent solely the interests of his client.

#### A. DEFENSE OF WHITE WOULD NOT VIOLATE PROFESSIONAL ETHICS.

One of the arguments advanced under this point is that the findings impose upon appellant the duty of maintaining a defense for White based upon his statement, regardless of the opinion of the appellant as to its credibility. Appellant claims that to defend when it did not believe the statement of its assured might result in having its counsel violate the provisions of section 6068 of the Business and Professional Act of California, subsection (c), and the Canons of Professional Ethics of the American Bar Association and of the State Bar of California, on the ground that a legal or just defense, or one honestly debatable, is not available in the opinion of appellant and its counsel. Is the insurance carrier to be the one that finally determines whether the assured's story is to be believed or not believed, or is that to be left to the trier of fact after a full and complete hearing of all of the evidence in the case?

The duties imposed upon counsel and referred to under this point do not prevent an attorney from defending actions such as have been commenced against White in the Superior Court. If a jury should accept his statement as true, that is, that he was asleep at the time of the accident, such an admission would not be conclusive proof of any negligence on his part. At most, it would establish only a *prima facie* case of negligence and call for an explanation or justification.

*Cooper v. Kellogg* (1935), 2 Cal. (2d) 504, 509, 42 P. (2d) 59;

*Bushnell v. Bushnell* (1925), 103 Conn. 583, 131 Atl. 432, 44 A. L. R. 785.

Further, there may exist a good defense of contributory negligence as the evidence is without conflict that

the deceaseds were crossing the highway at a point outside a marked or unmarked crosswalk [R. p. 245], and under such circumstances it was their duty to yield the right of way to the automobile operated by White.

*California Vehicle Code*, Sec. 562; Calif. Stat. 1931, Ch. 1026, Sec. 47, p. 2127.

There is also in the record an indication that appellant could produce evidence that the deceaseds were intoxicated at the time of the accident. [R. Tr. p. 320.] If it were true that they were intoxicated, it would be very material in determining the rights of their heirs to recover in the actions commenced against White.

*California Vehicle Code*, Sec. 565; Calif. Stat. 1939, Ch. 786, Sec. 1, p. 2315.

Appellant makes a great deal of the fact that White pleaded guilty to violating section 480 of the California Vehicle Code. This fact could only be received in the civil trials as an admission against his interest and *not as a judgment establishing the fact*.

*Longsley v. Obert* (1933), 129 Cal. App. 214, 218, 18 P. (2d) 725.

It is not inconsistent with his statement that he must have fallen asleep and the accident happened when he was asleep. He at no time told appellant he stopped at the scene of the accident or performed any of the other acts required by that section. In any event, it would appear that as long as the insured acts in good faith the insurer cannot dictate what plea shall be entered to a criminal charge.

Even the evidence adduced by the appellant at the trial corroborated White to the extent that it was proved be-

yond contradiction that a Lincoln automobile at the scene of the accident, with a broken left headlight, *came almost to a stop* and then continued on down the highway, when appellant's witness Raymond C. Cochran testified as follows:

"Q. Tell us what you saw the car do? A. It almost stopped. It slowed down very slow, and just as it came even with my station it speeded up a little bit, and passed on by." [Rep. Tr. p. 379.]

White testified that:

"When I got to San Clemente, I stopped at this drive-in and had two cups of coffee. I drove on. The next thing I knew my car was almost slowed down. Suddenly I realized I had been unconscious, or asleep, or something. I grabbed myself together, had to put the car in low gear to get it going again, and continue on my way." [Rep. Tr. pp. 453, 454.]

Finally, Dr. Victor Parkin, the medical expert called by appellant, although testifying that he did not believe White could pass through such an accident without being aware of it, admitted that it takes as much as a second for an individual to orient himself after having fallen asleep and lost consciousness, and that if one is awakened to full consciousness by shock and stimulus or force, there is apt to be confusion in regaining consciousness. [Rep. Tr. p. 367-368.]

Can it be said White had no defense that appeared to be "legal or just" or "honestly debatable?" Certainly not. *Whether the jury would accept it or not is not the point.* There are daily many defenses urged which are believed adequate by all interested in the defendant's case but not accepted by the trier of fact. If appellant was convinced the litigation could not be successfully defended it was then its duty to try to compromise the claims. It was fully advised of all the facts.

#### POINT IV.

##### **There Was No Breach of the Cooperation Clause and Appellant Was Not Prejudiced by Reason of White's Statements.**

Appellant in its brief does not claim that it can escape liability in the absence of prejudice. It tacitly concedes that the mere breach of the cooperation clause will not relieve it from liability unless prejudice results. It asserts, however, that if there is a substantial breach, prejudice is implied, and relies chiefly upon certain decisions of the Supreme and Appellate Courts of the State of California.

##### A. VALLADAO CASE DISTINGUISHED.

The main case relied on is *Valladao v. Fireman's Fund Indemnity Co.* (1939), 13 Cal. (2d) 322; 89 P. (2d) 643. The facts in that case clearly differentiate it from the case at bar. There the insured had reported that he was not present in and driving the automobile at the time the accident occurred. He repeated this assertion on numerous occasions and verified an answer which denied that he was driving the insured automobile. But *after* the answers were filed and the case was ready for trial he retracted this statement and admitted that he was the driver of the automobile and had told his false story because of certain prior convictions of traffic laws. The Supreme Court of California held first, that the false statement was a breach of the cooperation clause of the policy, and further held that the facts disclosed by the evidence in the case before it showed as a matter of law that the company had been prejudiced. It based its holding, that under the facts proved the company was prejudiced, because, having acted upon the false statement and having filed an answer verified by its insured,

which was false, it could not after the true facts were told it by the assured continue with the defense of the action without entirely reversing its position and filing an answer admitting facts that it had theretofore denied.

How can appellant seriously contend that the facts in the case at bar resemble in the slightest degree the facts in the *Valladao* case? As pointed out by the Supreme Court in the *Valladao* case, at pages 333-334:

“The insurance company had taken a formal position as to the facts from which it could not recede without great disadvantage. The answer bearing all the forms of verification was on file. The false statements had been made to the traffic officer, the investigator and others. A false plea had been entered before the justice and a false writing subscribed as a report. When the true facts were disclosed, the company had to exactly reverse its position with regard to essential facts and virtually proclaim their parties and chief witnesses to be liars and wholly unworthy of belief. Practically its only props were struck from under it. Better a great deal that there had been an absolute refusal to tell the facts at all than that it should have been deceived into taking a false position and then suffering the disadvantage and detriment of confessing it, thereby utterly destroying the credibility of the principal witnesses to the facts upon which it relied in defense.”

No such situation exists in the case at bar, for at the time defendant Home Indemnity Company was required to file answers in the state court actions in behalf of White it was fully advised that it was White's car which had struck the pedestrians. In the present action the Home admits that it was White's car that struck the



pedestrians, and both Mr. Menzies and Mr. Clifton testified that they had ascertained all of the facts which were proven by the Home in the case at bar and which establish that it was White's car that struck the pedestrians, prior to the time the answers were due. [R. pp. 395, 396, 429, 430.] They knew that White had pleaded guilty to hit-and-run driving. They knew the reasons that impelled him to plead guilty (this they had been told by Holt), and they knew that White claimed that he had fallen asleep and believed that the accident might have occurred during that time. The answers which were filed admitted the happening of the accident and there was therefore no issue upon that point to be tried in the state court actions, and the collateral issue as to whether White was asleep and did not know that an accident occurred or knowingly fled the scene of the accident (if that ever became an issue) could be tried as a question of fact to the jury upon conflicting inferences. *Under this situation the Home was not faced with being met at the trial by a statement of facts from its assured other than that which it had theretofore been given, but was in the same position as if all of the facts above related had been brought home to it in its first conference with White.*

Standard thinks it is relevant here, however, to point out that if White had acceded to the demands of the Home Indemnity Company, the very situation which was present in the *Valladao* case might have been present in this action. The evidence is unconflicting that the Home, after it discovered all of the evidence which proved beyond a question of a doubt that it was the car insured by it and driven by White which collided with the pedestrians, upon which facts it has itself in this action admitted the oc-

currence of said accident, tendered to White for verification by him answers which would have *denied* the occurrence of the accident. If these answers had been verified by White and filed by the Home, White would have found himself in the position of having denied an allegation which he knew to be true and having laid himself open to the charge by the Home that he had misled it by verifying a false answer and thus leading it to defend actions which it might otherwise have settled.

This appellee contends that the evidence in this case clearly points to the fact that it was the purpose of the appellant Home to create just such a situation and to attempt to bring itself within the decision of the *Valladao* case. It believes that this inference is one properly, if not necessarily, drawn from the following evidence: Immediately after the occurrence of the accident Home commenced its investigation, and by July 31st had acquired evidence which irrefutably established that it was its insured's car which was involved in the accident. [R. pp. 395, 396, 429, 430.] It was by then advised that White had fallen asleep and that the accident might have occurred during the time he was asleep. In fact, that was the only time it could have occurred, if White's statement that he did not know an accident occurred is true. It then had in its possession knowledge of all of the facts from which it now seeks to draw the inference that White's statement was false, but it did not deny liability or withdraw from the defense of the actions. It caused answers to be prepared which denied directly (not even for want of information or belief) the occurrence of the accident, and forwarded these to White to be signed, calling his attention to the fact that they were in accordance with his "sworn statement" [R. pp. 107, 116, 125], although at the

same time it expressed the opinion to Mr. Lonergan, attorney for the appellee Lee, that it did not believe White would sign the answers. [R. p. 440.] It was advised by Holt that White could not verify an answer which denied the occurrence of the accident. [R. p. 330.] The only logical inference that can be drawn from these facts is, first, that Home did not believe that it had a right to deny liability solely on the basis of the inferences to be drawn from the evidence which it had collected, and, second, that it desired to place its assured in the position of failing to cooperate by inducing him to sign an answer which it knew to be false, or to place him in the position of failing to cooperate by refusing to verify an answer which its agents, themselves, did not believe to be true and which was not in accordance with White's *full* statement to them, although in accordance with some of his answers in his original sworn statement.

The court will remember that before these answers were tendered, Mr. Menzies called Mr. Holt's attention to a decision, presumably the *Valladao* case [R. p. 323], and it is very probable that Mr. Menzies not only had that case in mind but the cases which hold that an assured fails to cooperate when he refuses to verify an answer which presents a defense borne out by provable facts, although he must have overlooked those cases which hold that an assured need not verify an answer which is sham and which contains denials which assured knows to be untrue, that is, he need not combine with the insurer to present a sham defense.

*Valladao v. Fireman's Fund Indem. Co.* (1939),  
13 Cal. (2d) 322, 329, 89 P. (2d) 643, *supra*;  
*Pacific Indemnity Co. v. McDonald* (1939), (C.  
C. A. 9), 107 F. (2d) 446, 452;

*Royal Indemnity Co. v. Morris* (1929) (C. C. A. 9), 37 F. (2d) 90, 92, cert. denied 281 U. S. 748, 50 S. Ct. 353;

*Coleman v. New Amsterdam Cas. Co.* (1928), 247 N. Y. 271, 160 N. E. 367, 72 A. L. R. 1443.

#### B. APPELLANT'S OTHER CASES DISTINGUISHED.

Appellant also cites and relies on *Margellini v. Pacific Automobile Insurance Co.* (1939), 33 Cal. App. (2d) 93, 91 P. (2d) 136. This case does not involve a question of false statements by assured, but involves a failure by assured to make any report whatsoever of the accident despite the efforts of insurer to secure one. Here, in the case at bar, there is no complaint that White did not make a report. The only complaint is that his original report was amplified before it was acted on by the Home by stating to the Home the true fact that White was asleep and that from the facts he had learned believed that it was his car that had caused the deaths of the two pedestrians.

Appellant also relies on *Wright v. Farmers Automobile Inter-Insurance Exchange* (1940), 39 Cal. App. (2d) 70, 102 P. (2d) 352. This case did not involve a trial of the issue as to whether or not assured's testimony was true, but on the contrary assured gave to his insurer one version of the accident and then at the trial testified to entirely different facts, and the court properly held that either his first statement was true and that he failed to cooperate by testifying falsely at the trial, or that his first statement was untrue and that he failed to cooperate by misleading his insurer *until the time of trial*. There are no such facts in the case at bar.

Appellant also relies on *Buffalo v. United States Fidelity & Guaranty Co.* (1936) (C. C. A. 10), 84 F. (2d)

883. This case reached the appellate court upon pleadings only. A careful examination of the cited case and its companion case, *United States Fidelity & Guaranty Co. v. Wyer* (1932) (C. C. A. 10), 60 F. (2d) 856 (cert. denied 287 U. S. 647, 53 S. Ct. 95, 77 L. Ed. 500), shows that the decision of the court was based upon the fact that the pleadings showed that the assured had reported to the insurer that he was not in the insured automobile at the time of the alleged accident, while the pleadings admitted that he was in that automobile, and, therefore, showed that his statement to the insurer, upon which it had acted in defending the action for personal injuries, was false. In other words, the court in *Buffalo v. United States Fidelity & Guaranty Co.*, *supra*, held that the facts before it showed that the assured had reported to insurer that he was not in the automobile at the time the accident occurred, that it had defended the action in the state court on that basis, while in the case brought by assured upon the policy the pleadings disclosed that the original statement was false and that the company had been led to defend the action by the false statement and was thereby prejudiced.

In *Hynding v. Home Acc. Ins. Co.* (1932), 214 Cal. 743, 7 P. (2d) 999, the assured's report indicated a good defense, but he refused to attend the trial and to testify in accordance with the report, or to assist in obtaining information and witnesses.

In *Purefoy v. Pacific Auto Indem. Exch.* (1935), 5 Cal. (2d) 81, 53 P. (2d) 155, the assured failed to report the accident to the company until served with summons one year and three months after the accident. The first notice of the accident was a letter from plaintiff's

attorney, received by the insurer three and a half months after the accident.

Appellant cites the case of *Miller v. Union Indemnity Co.* (1924), 209 App. Div. 455, 204 N. Y. Supp. 730, and on page 25 of its brief sets forth what purports to be a quotation from that decision. It is submitted that a careful reading of the decision of the cited case does not reveal the quotation set forth. Presumably the quotation was taken from some other case, the name of which, of course, this appellee has not been advised of and, for that reason, cannot discuss the facts of that case in this brief.

*In all of the cases cited by appellant the insurer had acted upon and had been prejudiced by the false statement of the insured, and the falsity of that statement was shown by his own evidence or statements.*

An insurer is not prejudiced by an untrue statement from the assured unless it is misled by such statement, and where it is not misled the false statement does not operate to release the insurer under the cooperation clause.

*Albert v. Public Service Mutual Casualty Ins. Corp.* (1943), 266 App. Div. 284, 42 N. Y. S. (2d) 124;

*Western Casualty & Surety Co. v. Weimar* (1938) (C. C. A. 9), 96 F. (2d) 635.

This court has had occasion to consider some of the phases of the question raised on this appeal in *Pacific Indemnity Co. v. McDonald* (1939) (C. C. A. 9), 107 F. (2d) 446. In that case the insured guest passenger had been injured while riding in an automobile insured in Pacific Indemnity Company and which was being driven by its insured, McDonald, at the time of the accident.

Upon suit being started by the injured party the insurer commenced an action for declaratory relief, alleging, among other things, that it had been relieved from any liability on the policy because its insured and the injured party were fraudulently conspiring to procure a judgment against the insured and, further, that the insured had breached the conditions of his policy by false statements concerning the accident and failure to cooperate with the insurance company in the defense of the action. In affirming the judgment of the trial court, entered upon the verdict of the jury finding that there was no breach of the cooperation clause of the policy or lack of cooperation or collusion, this court said, at page 447:

“The appellee McDonald . . . admitted that on August 18, 1936, he had falsely stated that his car had been forced off the road by an oncoming car, but that a week later, on August 25th, he had corrected the statement and had truly stated the facts concerning the accident to the appellant. He denied the charges of collusion and noncooperation.”

Further, at page 450:

“The prompt withdrawal of the falsehood cured the default in the absence of some showing that the company was prejudiced by the delay in telling the truth.”

And again, at page 451:

“At the trial appellee McDonald testified that his statement of August 25th was a true statement. He testified that he did not know whether or not he went to sleep, and that he had ‘no recollection of the accident other than the fact that it happened.’ Appellee Brune testified that she spoke to him shortly before the accident and he did not answer, although his car

was going faster. The evidence would indicate that appellee McDonald honestly might be quite hazy in his recollection of the facts owing to his loss of sleep and excessive drinking.”

And, finally, at page 452:

“It should not be forgotten that even if appellee McDonald had no defense against the charge of intoxication and gross negligence he nevertheless was entitled to have the assistance of the appellant upon the issue of damage.”

Even though it be true that under the law of Oregon, where the cited case arose, the insurer is required to show prejudice before it could establish a breach of the cooperation clause of the policy, this appellee submits that the comments of the court set forth are pertinent to the case at bar. In the cited case the insured admitted that his first statement was false but a week later he corrected it and truly stated the facts concerning the accident. *In the case at bar White at no time gave a false statement*, he merely amplified or explained his original statement when he advised appellant that he may have fallen asleep and that the accident may have happened at that time. This explanation was made a few days after the accident, and, more important, *before* appellant had done anything that would subsequently affect its position in the defense of the state court actions.



C. CALIFORNIA LAW ALLOWS TWENTY DAYS TO GIVE NOTICE.

It is undisputed that the appellant received an oral report from White of the fact that the accident had occurred within *two* days following its occurrence, and a sworn statement was given by him *three* days after the accident, and appellant was advised of all of the facts and circumstances surrounding the accident in so far as known to White prior to his entering a plea of guilty to the criminal charge *eleven* days after the accident occurred. Under the law of the State of California, which was a part of the policy as much as if it had been printed therein, it is provided as follows:

“Except in the case of life, marine, or fire insurance, notice of an accident, injury, or death may be given at any time within twenty days after the event, to the insurer under a policy against loss therefrom. In such a policy, no requirement of notice within a lesser period shall be valid.”

*Insurance Code of the State of California*, Section 551; Calif. Stats. 1935, Ch. 145, Sec. 551, p. 510.

It is clear that appellant received from White everything to which it was entitled concerning the happening of the accident well within the time prescribed by the law of the State of California.

In view of this fact, how can it be said that White breached the cooperation clause of appellant's policy? It knew all of the facts which it now claims conclusively proved that White was awake, and was fully advised as to

every fact concerning the accident which would enable it to make the determination whether to defend or settle long before an answer to the state court actions was prepared and less than twenty days after the accident.

This case is on its facts entirely different from any reported case. Prior hereto no insurer has sought to escape liability under its cooperation clause, except in cases where it has *acted to its prejudice* upon a misstatement by insured and he has either withdrawn that statement or has given testimony which in itself proved the falsity of the statement to his insurer and upon which it had acted.

This appellee directs the court's attention to the fact that the defense of breach of the cooperation clause has been denied by the courts in many cases where the factual situation was much more favorable to the insurer than are the facts in the case at bar.

*Pacific Indemnity Co. v. McDonald* (1939) (C. C. A. 9), 107 F. (2d) 446, *supra*;

*Western Casualty & Surety Co. v. Weimar* (1938) (C. C. A. 9), 96 F. (2d) 635, *supra*;

*Ocean Accident & Guarantee Corp. v. Lucas* (1934) (C. C. A. 6), 74 F. (2d) 115;

*Associated Indemnity Corporation v. Davis* (1943) (C. C. A. 3), 136 F. (2d) 71;

*Rockmiss v. New Jersey Mfgs. Ass'n Fire Ins. Co.* (1934), 112 N. J. L. 136, 169 Atl. 663;

*Albert v. Public Service Mutual Casualty Ins. Corp.*, *supra* (1943), 226 App. Div. 284, 42 N. Y. S. (2d) 124.

In *Porter v. Employers' etc. Corp., Ltd.* (1940), 40 Cal. App. (2d) 502, 104 P. (2d) 1087, the court says, at page 515:

“Certainly an insured cannot be charged with lack of cooperation simply because of minor variances in her various statements. It would be most startling indeed if such variances did not occur. Moreover, unintentional and accidental mistakes in statements made by the insured do not violate the cooperation clause.”

White still maintained that he knew none of the facts of the accident. Was appellant's position in any wise changed or prejudiced because of this clarification? Would its opportunity to investigate and dispose of the claims have been better if White had told a representative of appellant the first time he talked to him that he may have fallen asleep and the accident may have occurred at that time, although he knew none of the facts of the accident? Certainly not. Appellant, although having the opportunity, makes no attempt whatsoever to show that it was in fact misled or prejudiced. It cannot show that. There has been no breach of the cooperation clause.

### Conclusion.

It is respectfully submitted that the evidence is clear and amply sufficient to demonstrate that White did not breach the cooperation clause of appellant's policy but to the contrary, fully cooperated with appellant in every way requested and that appellant, long before it took any action and within eleven days after the happening of the accident, not only was fully advised by White as to all facts within his knowledge but through an independent and complete investigation had determined that the automobile it insured and which was driven by White was the one involved in the accident resulting in the death of the two pedestrians.

It is submitted that the judgment should be affirmed in its entirety.

Respectfully submitted,

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*Attorneys for Appellee Standard Accident Insurance  
Company of Detroit, a Corporation.*

No. 11661

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

HOME INDEMNITY COMPANY OF NEW YORK, a Corpora-  
tion,

*Appellant,*

*vs.*

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT,  
a Corporation, *et al.*,

*Appellees.*

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APPELLANT'S REPLY BRIEF.

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---

**APPELLANT'S REPLY BRIEF.**

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It is conceded in the brief of appellee Standard Accident Insurance Company in its statement of the case (App. Br. p. 2) that the appellant's statement of the case relating to the issuance of the policy of insurance by the appellant and appellee and the quoted provisions of each policy involved are correct.

In this state of the record the primary question involved in the appeal becomes whether defendant White, operator of the car involved in the accident, was within the coverage of appellant's public liability policy, or was brought within that coverage by the appellee, plaintiff below.

The insurance clause of appellant's policy expressly provided that the insurance was subject to the conditions

contained in the policy. [R. p. 26.] Condition "6" expressly provided that "no action shall lie against the company unless, as *a condition precedent thereto*, the insured shall have fully complied with the provisions of this policy \* \* \*."

Condition "17" contained the provision requiring the co-operation of the assured. [R. p. 28.]

Thus, the burden of establishing that White had complied with appellant Home's insurance policy and the coverage thereby asserted, was assumed by the appellee, Standard Accident Insurance Company of Detroit, plaintiff below, in order that its own policy issued directly to White might be termed excess coverage, as defined in its policy. As plaintiff in the action it was as incumbent upon appellee to establish the compliance by White with the terms of appellant's policy as it would have been had the action been instituted directly by White.

Of course, if the appellant had initiated the action below to have it established by declaratory judgment that its policy was not in force, it would thereby have assumed the burden of proof of establishing the breach by White of the conditions of its policy.

In the case of *Fidelity Union Fire Ins. Co. of Dallas, Texas, v. Kelleher*, 13 F. (2d) 745, the Court said in reversing a judgment in favor of the plaintiff in an action to recover upon a policy of fire insurance:

"Following the steadily adhered to decisions of the Supreme Court, it is seen that the present case is directly within the well settled rule of the federal

courts, that the terms of the policy are the measure of the liability of the insurer, and that, to recover, the insured must prove that he is within those terms.

“In *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 S. Ct. 379, 38 L. Ed. 231, the court said: ‘It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consists simply in enforcing and carrying out the one actually made.’ ”

To the same effect is *Carabelli v. Mountain States Life Insurance Company et al.*, 8 Cal. App. (2d) 115 at 117, where the Court said:

“The general rule is that an insured must bring himself within the express terms of the policy before he is entitled to recover thereon and where these terms are plain and explicit, the courts cannot create a new contract for the parties by a forced construction of such plain and explicit terms \* \* \*.”

In the case of *Bachhuber v. Boosalis*, 200 Wis. 574 (229 N. W. 117), the Court held that a clause that the insured shall co-operate fully with the company is a *condition precedent*, failing to perform which, in the absence of waiver or estoppel, constitutes a defense to liability on the policy.

In *State Farm Mutual Auto. Ins. Co. v. Bonacci*, 111' F. (2d) 412, the Court appears to have recognized that a co-operation clause was a condition precedent to the recovery under the policy involved in that action, which was brought by the insurance company to avoid liability under its automobile liability policy, because of the insured's failure actively to co-operate in the defense of a damage action against the insured. The case is also authority that in such action the insured was bound by his testimony and admissions against interests made in the damage action, and written statement and proof of loss furnished to the insurer.

In *Whittle v. Associated Indemnity Corporation*, 130 N. J. L. 376 (33 A. (2d) 866), the Court held a co-operation clause is a condition in the nature of a promissory warranty and condition precedent to the right of recovery.

Also *Conold v. Stern*, 138 Ohio State 352 (35 N. E. (2d) 133), the holding was that a clause in a liability insurance policy requiring the insured's co-operation, aid and assistance in the defense of an action against him is a material condition of the policy, the violation of which by the insured forfeits his right to claim indemnity under the policy and is a condition precedent, failure to perform which, in the absence of waiver or estoppel, constitutes a defense to liability on the policy.

### **Reply to Point I of Appellee's Brief.**

The principle of law referred to by appellee that it is the duty of the trial court to render judgment in accordance with the testimony and evidence it determined was most worthy of belief, does not meet the objection of the appellant to the conflict in White's own statements, which were pointed out in appellant's opening brief, and which were so utterly inconsistent as to being incapable of being reconciled.

Obviously, statements diametrically opposite concerning the happening of the accident and White's connection with it could not both be true, and yet, the trial court undertook to find that White had made neither conflicting nor misleading statements. [R. p. 183.]

Under *Point II* of its opening brief, appellant has pointed out fully the particulars in which the findings of fact necessary to sustain the judgment are not supported by evidence worthy of belief.

### **Reply to Point II and Point III.**

Under *Point II* appellee appears to argue that if, without White's co-operation, appellant made an investigation of the facts of the accident, it would not be prejudiced by any misstatement of facts given by White, and yet proceeds to argue under *Point III* that counsel for appellant having the duty of conducting the case before the Court, must do so on the basis of White's statements, and not on the result of their own investigation of the facts.

It would have been one thing for the Honorable District Court to find and determine that the appellant must de-

fend the assured, although judgment and establishment of liability on the part of White was inevitable, but the appellant argues that the trial court erred and invaded the province of counsel in holding that "it was the duty of appellant Home Indemnity Company to try to establish the truth of the statement of George White, that he was asleep and did not know the accident occurred, so long as George White maintains such statement is true." [R. p. 184.]

In *Margellini v. Pacific Auto. Ins. Co.*, 33 Cal. App. (2d) 93, it appears that the co-operation clause was expressly made a condition subsequent rather than a condition precedent to a liability under the public liability and property damage insurance policy involved in the action. In holding that there was a breach of the co-operation clause and that prejudice was presumed as a matter of law therefrom, the Court recognized the right of the insurer to have a truthful statement from the insured himself.

### Reply to Point IV.

Under *Point IV* the appellee argues that there was no breach of the co-operation clause and that appellant was not prejudiced by reason of White's statements.

While recognizing on pages 26 and 27 of its brief the possibility of a defense to the actions for damage based on contributory negligence, counsel for appellee appear to overlook the prejudice to the appellant inherent in having to conduct a defense of the action without the benefit of White's testimony or assistance as a witness, or in the alternative, offering him as a witness, therefore vouching for his credibility and being confronted with his previous various conflicting statements. It scarcely seems to re-

quire extended argument that White had destroyed his usefulness as a witness in the damage actions in view of the provisions of Section 2052 of the California Code of Civil Procedure, which provides:

“A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony \* \* \*.”

In *Storer v. Ocean Accident & Guarantee Co.*, 80 F. (2d) 470 (6th Cir.), it was held that failure of the insured under automobile liability policy to co-operate with insurer in defense of action *was not cured by co-operation of insured upon second trial, especially where insured's credibility had been destroyed by false testimony upon first trial*, the Court stating at page 472:

“The co-operation clause was both material and important. Its purpose was twofold: (1) To require the insured to aid in preparing the case for trial and in making proper defense; and (2) to prevent collusion between the insured and a friendly claimant. ‘When the condition was broken, the policy was at an end, if the insurer so elected.’”

Even if the appellant had no defense against the charge of negligence or escape from liability, it was entitled to the assistance of White at the trial upon the issue of damages.

The cases hereinafter cited fully recognize that it is not an excuse for a breach of the co-operation clause in an insurance policy that there is no defense to the action, or that the facts, if correctly stated, could only lead to liability.

In *Coleman v. New Amsterdam Cas. Co.*, 247 N. Y. 271, 160 N. E. 367, Judge Cardozo said in a case involv-

ing an asserted breach of the co-operation clause of policy of insurance:

“The plaintiff makes the point that the default should be condoned, since there is no evidence that co-operation, however willing, would have defeated the claim for damages or diminished its extent. For all that appears, the insurer would be no better off if the assured had kept its covenant, and made disclosure full and free. Co-operation with the insurer is one of the conditions of the policy. When the condition was broken, the policy was at an end, if the insurer so elected. The case is not one of the breach of a mere covenant, where the consequences may vary with fluctuations of the damage. There has been a failure to fulfill a condition upon which obligation is dependent.”

In *Gilbert v. Indemnity Insurance Co. of North America*, 252 N. Y. 330 (169 N. E. 403), the Court said in holding that the trial court erred in taking the question (compliance with co-operation clause) from the jury and directing a verdict in favor of the plaintiffs:

“Who can tell whether Jacob Wasserman was telling the truth when he made the affidavit or when he said at the time of the trial that he could not remember. A failing memory may be a false excuse as well as a true one. A witness has been sent to jail for perjury who falsely testified to loss of memory. The testimony of Wasserman, if given according to his affidavit, was at least material on the trial of the negligence cases. It might have helped the defendant and the insurance company and again it might not have been of any avail. *This, however, is not the point. The insurance company was entitled to the defendant's assistance and to a truthful statement of the cause of the accident.* \* \* \*



Ir. *Margellini v. Pacific Auto. Ins. Co.*, 33 Cal. App. (2d) 93, at page 99:

“If it be assumed that any information which could have been furnished, in response to the appellant’s request, would have disclosed or led to the discovery of the fact that no defense existed, that very fact would have shown the desirability of settling the claim. \* \* \*”

In *Miller v. Union Indemnity Co.*, 209 App. Div. 455, 204 N. Y. Supp. 730, the Court said:

“It is of no relevancy that the claim against the respondent (assured) was a valid one, and one which, in the ordinary course, if the conditions of the policy had been complied with, the appellant company (insurer) would ultimately have been obliged to pay. Such conditions would be robbed of nearly all practical value if, in applying them, the question of the validity of the professed claim must be investigated.”

### **Appellee’s Cases Distinguished.**

On page 40 of its brief, appellee cites cases in which it is asserted the defense of breach of the co-operation clause was denied by the courts where the factual situation was more favorable to the insurer than are the facts in the case at bar.

Two, at least, of the cases cited arose in jurisdictions which have not adopted the rule that prejudice is presumed as a matter of law from the breach of the co-operation clause, but have held that prejudice must be proved.

In *Pacific Indemnity Co. v. McDonald et al.*, 107 F. (2d) 446, the Court, at page 449, expressly recognized that the question of whether there had been a breach of

the co-operation clause was one of local law and in that case was controlled by the law of the State of Oregon where the policy issued, the accident occurred, and the case tried.

Similarly, the case of *Associated Indemnity Corporation v. Davis*, 136 F. (2d) 71, decided in the Third Circuit Court of Appeals, arose in Pennsylvania, and the Court said at page 74:

“The Pennsylvania decisions are to the effect that the insurer is not relieved from liability unless the insured’s failure to co-operate results in substantial prejudice and injury to the insurer’s position.”

In *Western Casualty & Surety Co. v. Weimar*, 96 F. (2d) 635, decided in the Ninth Circuit Court of Appeals on May 2, 1938, while the clause requiring co-operation of the assured did not apparently differ materially from the co-operation clause in the policy of appellant Home, involved in the action at bar, it does not appear that compliance with the condition was expressly declared to be a condition precedent to the institution of any action on the policy, as did the Home’s policy [Condition “6,” R. p. 27]; and in so far as the opinion is based on the California cases cited therein of *Hynding v. Home Accident Insurance Co.*, 214 Cal. 743; *Panhans v. Associated Indemnity Corp.*, 8 Cal. App. (2d) 532, and *Norton v. Central Surety & Ins. Co.*, 9 Cal. App. (2d) 598, in holding that prejudice from the breach of a co-operation clause of an insurance company must be proved, the cases having been superseded by the *Valladao* case, it does not appear that the opinion can be regarded as based on the California law.

In the case of *Ocean Accident & Guarantee Corp. v. Lucas*, 74 F. (2d) 115, in affirming the judgment for the

plaintiff the Court said that the main issue in the case was whether Butler (one of the appellees) made full disclosure to the appellant before the trial of the facts to which he testified at the trial in the state court.

The Court said at page 117 that unless Butler had complied with the conditions of the policy Mrs. Lucas (plaintiff below) could not recover.

The Court noted that there were three variances between Butler's two accounts of the accident:

*First*, in a written statement given to the adjuster, Butler declared that the accident was caused by the fact that a car turned abruptly in front of him into his lane of traffic, which caused him suddenly to stop his car, and that his car was thereupon struck in the rear by a car, which shoved him forward so that he collided with an oncoming car which was somewhat over the center line of the street. At the trial Butler, who was called for cross-examination by Mrs. Lucas and was not examined by the appellant, said nothing about being shoved by a car behind him.

*Second*, Butler, in his signed statement, said that at no time was his automobile over the center line of the street. At the trial Butler said "after the collision" the front end of his car was over the center line, and that skidmarks of his car extended from 18 to 24 inches beyond the center line.

*Third*, the signed statement said that without any warning the car at Butler's right pulled abruptly to the left and in front of him. At the trial, Butler stated that he "thought" he "could beat him to it \* \* \* and stepped on it."

The policy required the assured, whenever requested by the company, to “co-operate with the Company, except in a pecuniary way, in all matters which the Company deems necessary in the defense of any suit.”

The District Court charged that it was the duty of Butler under the policy to give the truth in any statements which he made to the company, according to his best capacity and understanding of the events and circumstances of the accident, and that it would not be co-operating, as required by the policy, if Butler consciously testified to a set of facts materially different from that which he had given in any previous statement to the company’s agent and attorneys.

The Court found no reversible error in the charge of the District Court, and in the course of its opinion noted the definition of “co-operation” given by Mr. Justice Cardozo in *Coleman v. New Amsterdam Casualty Co.*, 247 N. Y. 271, 160 N. E. 367: Co-operation means “that there shall be a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense.”

The Court also cited *United States Fidelity & Guaranty Co. v. Wyr*, 60 F. (2d) 856, to the effect that a deliberate and wilful falsification of material facts would have violated the terms of the policy.

The appellant believes that the record amply sustains its position that there was a deliberate and wilful falsification of the material facts by White in the case at bar.

In *Rockmiss v. New Jersey Mfgs. Ass’n Fire Ins. Co.*, 112 N. J. L. 136, 169 Atl. 663, next cited by appellee, it was held that there was not sufficient variance in the accounts of the accident given by the assured to the insurer

to amount to a violation of the co-operation clause, the variance apparently being, mainly, as to the rate of speed of the vehicle being operated, coupled with an admission of negligence.

Counsel for appellant are unable to agree that the variance in the statements is at all comparable to the conflicting statements made by White in the instant case.

In *Albert v. Public Service Mutual Casualty Ins. Corp.*, 226 App. Div. 284, 42 N. Y. S. (2d) 124, the variance appears to have been in the difference of the statements made by the driver of the insured to the insurer, and that made to the Motor Vehicle Department; in the first, the driver having reported that he "stopped, then felt a bump from the rear of the car, got out and saw the colored man lying on the ground"; and in the report to the Motor Vehicle Department, that "while backing the truck he accidentally struck the plaintiff with back of the car."

While it was held that the variance did not constitute a lack of co-operation, it is interesting to note that in the dissenting opinion by Justices Martin and Dore it was stated that "the arguments that the insurers would be no better off if the insured had made a truthful disclosure of the facts, and if the company would have found out by its own investigation the facts, including the contradictory admissions of liability, misconceived the effect of refusal to co-operate.

*Porter v. Employers' etc. Corp., Ltd.*, 40 Cal. App. (2d) 502, 104 P. (2d) 1087, last cited by appellee and involving an asserted breach of co-operation clause of insurance policy, can only be regarded as applicable on the assumption that the record sustained the finding of the trial court that there was no breach of the co-operation clause, and the conflicting statements of the insured again

appeared to involve nothing more than a variance in the speed of the car and the condition of the tires, a factual situation not comparable to the facts of the case at bar.

### Conclusion.

In conclusion, it is respectfully submitted that the record does not sustain the findings and judgment of the Honorable Trial Court, that there has been no breach of the co-operation clause of the appellant's policy, nor the finding that the appellant has not been prejudiced thereby, nor has the defendant White been brought within the coverage of appellant's policy, for which reasons the judgment appealed from should be reversed.

Respectfully submitted,

THOMAS P. MENZIES and  
HAROLD L. WATT,

By HAROLD L. WATT,

*Attorneys for Appellant.*

No. 11661

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

HOME INDEMNITY COMPANY OF NEW YORK, a corporation,

*Appellant,*

*vs.*

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT,  
a corporation, *et al.*,

*Appellees.*

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PETITION FOR REHEARING.

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*Appellant,*

*vs.*

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a corporation, *et al.*,

*Appellees.*

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## PETITION FOR REHEARING.

---

*To the United States Circuit Court of Appeals for the  
Ninth Circuit and to the Judges Thereof:*

Comes now appellee, Standard Accident Insurance Company of Detroit, a corporation, and presents this, its petition for a rehearing of the above entitled cause, and, in the event such rehearing be denied, for a clarification of the opinion heretofore filed, and in support thereof respectfully shows:

I.

**It Is Respectfully Submitted That a Rehearing Should Be Granted as This Court's Opinion Does Not Expressly Dispose of This Appellee's Theory of the Case and Contention Made at Oral Argument in Regard to the Effect on Appellee's Policy of a Breach by White of Appellant's Policy.**

The statement in the first paragraph of the opinion is that Standard's complaint prayed for judgment declaring, ". . . that it had no liability to pay any judgment that might be rendered therein *until the appellant had fully paid and discharged its liability* under a certain policy of automobile liability insurance issued by it." (Emphasis supplied.)

A further statement, on page 3, is that

"Accordingly, Standard is endeavoring to fix the appellant's liability as the primary insurer, so that Standard itself *may become* only the excess insurer, under the provision in Standard's policy relative to 'excess insurance over any other valid and collectible insurance available to the insured.' " (Emphasis supplied.)

This leaves serious doubt in our minds as to whether or not the court overlooked the paragraph of the prayer to the effect that if it be determined that White breached the conditions of appellant's policy and thereby released appellant from its obligations to him then it be adjudged that this appellee is not obligated to defend the state court actions but "that its sole obligation under said policy is to pay such portion of such judgment or judgments which may be rendered against said George White in said actions as shall be in excess of the insurance that would

have been available to said George White had he not breached the terms and conditions of said policy of insurance issued by defendant Home Indemnity Company of New York as in this complaint alleged, and which excess is not in excess of the limits of liability as set forth in the policy of insurance issued by this plaintiff." [Prayer of Complaint, par. 5, Tr. pp. 15-16.]

Irrespective of the express condition of this appellee's policy as to cooperation, White impliedly covenanted to act in good faith and not to do anything which would prejudice this appellee and deprive it of its rights under its contract, and that he therefore could not, by failing to perform the conditions of the Home's policy on his part to be performed and thereby releasing it, change the obligation of Standard from that of insurer of only that part of his liability to the appellees Fitzgerald, Lee, *et al.*, as was in excess of \$100,000 as to each, to an insurer of the *first dollar* of that liability.

That White did covenant to use good faith and not to so act as to deprive Standard of the fruits of its contract (its right to be an excess insurer only) is clearly established.

See:

*Universal Sales Corp. v. Cal. etc., Mfg. Co.*, 20 Cal. (2d) 751, 771, 128 P. (2d) 665;

*Uproar Co. v. National Broadcasting Co.*, 81 F. (2d) 373, 377 (C. C. A. 1).

The situation here is analogous to that of a person who has made a promise, the performance of which is dependent upon the happening of an event. The promisor in such a case cannot avoid liability by himself so acting as

to prevent the event upon which his promise is contingent from occurring.

See:

*Taylor v. Simi Construction Co.*, 23 Cal. App. 308,  
137 Pac. 1095.

*Carl v. Eade*, 81 Cal. App. 356, 253 Pac. 750.

The reason for this rule is that one may not take advantage of his own wrong, which is a maxim of law established by the Civil Code of California (see Sec. 3517, Civ. Code).

At the time of the occurrence of the accident Home's policy constituted primary insurance and was valid and collectible. It still remained valid and still remained collectible, until White by his own intentional wrong, that is, his wilfull failure to cooperate with the Home, had released it from liability. Certainly, if a person cannot escape liability by preventing the happening of an event upon which his promise to perform is contingent, he cannot by failure to carry out his contractual obligations under one contract, change the position of a party with whom he has another contract so as to create a liability on that party which would not, except for his wrongful acts, have existed.

There is also an analogy between the situation here and one which often arises under the law of suretyship. If the obligee under a contract of suretyship holds security from the principal and releases that security, the surety for the principal is uniformly held to be released, at least to the extent of the value of the security which the obligee gives up.

*Kicssig v. Allspaugh*, 91 Cal. 231, 232-233, 27  
Pac. 655;

*Eppinger v. Kendrick*, 114 Cal. 620, 625-626, 46 Pac. 613;

*Montgomery v. Sayre*, 100 Cal. 182, 34 Pac. 646;

*Lamb v. Wahlenmaier*, 144 Cal. 91, 94-95, 77 Pac. 765.

The reason why the surety is released is because the security of the principal which he holds is the primary security for the performance of the obligation of the principal, and he cannot by releasing that make the surety liable upon his contract primarily instead of only liable after the primary security has been exhausted.

Certainly it must be admitted that at the time of the accident the policy of appellant was "valid and collectible insurance available to the insured" (White). The only breach claimed by appellant was the statements made by White *after* the accident in reporting the same to appellant and others. This court has decided that White, *after the accident*, voluntarily breached appellant's policy. Before such breach it was valid and collectible insurance available to White. The provisions of appellant's policy and the one issued by this appellee in regard to "Assistance and Cooperation of the Insured" and "Action Against Company" which are quoted in the opinion of this court, are identical, as are almost all other important provisions of the two policies.

If, in fact, there is any liability at all on the part of the Standard to pay any of the amount of the judgments entered in said state court actions, it should be held expressly that Standard is not liable unless and until the judgment in each action exceeds the sum of \$100,000.00, and not left to interpretation of the opinion.

II.

It Is Submitted That, in the Event the Court Declines to Grant a Rehearing, for the Guidance and Benefit of Counsel and Litigants in This Matter and to Prevent Further Litigation, the Opinion of This Court, Filed May 11, 1948, Should Be Expressly Amplified as to the Intended Effect on the Rights Between This Appellee and the Other Appellees.

The opinion of this court contains the following:

“The learned District Judge found that White did not ‘make any false, conflicting, misleading or inconsistent statements of fact’ in reporting the accident to the appellant; that the appellant ‘has not been in anywise prejudiced by any action or statement or omission’ of White; and that, having assumed the defense of the state court actions, the appellant has the duty ‘to attempt to establish the truth of the statement of George White, that he was asleep and did not know that the accident occurred, so long as said George White maintains that said statement is true,’ etc.

The first two of these findings are inferences from undisputed testimony or documentary evidence, from which we are in as good a position to draw deductions as was the court below. The third ‘finding of fact’ is in reality a pure conclusion of law.

Believing that *all three of the above holdings* are ‘clearly erroneous,’ we are compelled to the conclusion that the *judgment based thereon* cannot stand. (Emphasis added.)

Accordingly, the judgment is reversed.”



The findings referred to above are numbers 16, 17, 18 and 19 [Tr. p. 183].

This appellee believes that it was the intent of this Honorable Court from the foregoing portion of the opinion to reverse only the three "above holdings" and the "judgment based thereon" which appellee interprets as being paragraphs 1, 2, 3, 4 and 9 of the judgment, which are found at pages 189-190 of the transcript of the record.

Under the general rules governing the effect of a reversal this appellee assumes that the remaining paragraphs of the judgment are not affected by the decision as no appeal was taken by any of the appellees. However, the broad statement of this court that "Accordingly, the judgment is reversed," is open to interpretation and contention that this court decided *all* paragraphs of the judgment were reversed and rendered of no effect.

In *Tillman & Bendel v. California Packing Corp.* (C. C. A. 9), 63 F. (2d) 498, 501, the court says:

"Since the appellee has filed no cross-appeal, and since no plain error of law is involved in the court's finding, it will not be disturbed."

In *Muskogee Nat. Tel. Co. v. Hall* (C. C. A. 8), 118 Fed. 382, 384, the court says:

"The judgment of the United States court of appeals in the Indian Territory, insofar as it undertook to reverse the decree of the lower court and to grant an injunction in favor of the Creek Nation, was erroneous, for the reason that the nation had not appealed from the decree of the lower court, so far

as the record now before us discloses. . . . It failed to take an appeal from the decree, and the adjudication of the lower court, so far as it was concerned, accordingly became final.”

See also:

*Philadelphia Casualty Co. v. Fechheimer* (C. C. A. 6), 220 Fed. 401, 418;

*Guardian Savings and Trust Co. v. Dillard* (C. C. A. 8), 15 F. (2d) 996, 998;

*Reynolds Spring Co. v. L. A. Young Industries, Inc.* (C. C. A. 6), 101 F. (2d) 257, 262.

In California, the rule has been clearly stated in *Smith v. Anglo-California Trust Co.*, 205 Cal. 496, 505, 271 Pac. 898, where the court says:

“For the guidance of the court below it is proper to state herein that the nonappealing lien claimants are not in a position to derive any benefit from the reversal in part of the judgment. (*Lake v. Superior Court*, 187 Cal. 116, 118-120 (200 Pac. 1041, 1042).) In the cited case it is declared that ‘an appeal by only a portion of the defendants, however broad in terms the notice of appeal may be, is, in legal effect, an appeal only from a portion of the judgment affecting them, and gives jurisdiction to the appellate court to reverse or modify the judgment only in so far as it affects the interests of the appellants.’ The judgment in the instant case by separate and numbered paragraphs adversely disposes of the asserted severable rights and interests of the respective lien claimants in and to the sum of money in dispute. It necessarily follows, therefore, that the respective appealing lien claimants could prosecute an appeal only from such portions of the judgment as affect them, and this despite the statement in their notice of appeal that the

appeal is ‘from the whole and from each and every part of that certain judgment given and made herein. . . .’”

For the reasons above stated, it is respectfully submitted that this court should, for the guidance of all parties concerned, amplify its opinion by expressly limiting the reversal of the judgment to paragraphs 1, 2, 3, 4 and 9 thereof, which are the only ones affecting the rights of the appellant.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that a rehearing be granted or, in the event the same be denied, that the court amplify its opinion in the manner suggested.

Respectfully submitted,

JONES, THOMPSON & KELLY,

By EVERETT W. THOMPSON,

*Attorneys for Appellees.*

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### Certificate of Counsel.

I one of the counsel for the above named Standard Accident Insurance Company, do hereby certify that the foregoing Petition for Rehearing of this cause or amplification of the opinion filed therein is presented in good faith and not for delay.

EVERETT W. THOMPSON.









